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Ignacio A. Boulin Victoria

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# BACK TO POLITICS: LESSONS FROM THE CRISIS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

*Ignacio A. Boulin Victoria\**

## INTRODUCTION

Rights language is often used in international law as a powerful translation of political claims. In such a way, the actors on the international political stage play their part packaging their interests as rights. This tactic, however, brings with it an impoverishment of dialogue: as they ought to trump in every political controversy, the presence of rights in the discussion leave almost no room for anything else.<sup>1</sup>

Under this paradigm, the importance of human rights international treaty bodies has logically increased; to the extent that human rights are the legal synonyms of goodness, beauty and truth, then treaty bodies are their modern oracles. Particularly in Latin America, where international human rights law and the regional bodies in charge of its application, the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights, played a critical role in the transition from military regimes to democracy.<sup>2</sup> this idea bears a well-rooted legitimacy.

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\* Ignacio A. Boulin Victoria, LL.M. 2014, Harvard Law School.

1. On rights as trumps, see Ronald Dworkin, *Taking Rights Seriously* (1978). Criticizing the rights language, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991). For a critical perspective, see David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* 4-35 (2004).

2. A direct example that will be addressed later is Inter-Am. Comm'n H.R., *Report on the Situation of Human Rights in Argentina*, OEA/Ser.L./V/II.49,?doc. 19 corr.1 (1980). For a general description of the process, see Ellen Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54(3) INT'L ORG. 633 (2000). Against this idea, see JACK L. GOLDSMITH & ERIC E. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 144 (2005) (stating "[i]n fact, human rights violations declined in [Honduras and Argentina, who had signed ICCPR and Uruguay and Paraguay who had not] at roughly the same time, for roughly the same reason: increased international attention to the human rights practices of the two states, followed by a new U.S. policy under the Carter administration, supported by Congress, to withdraw aid from governments that violated human rights. Neither the activists nor journalists who highlighted the human rights abuses nor the Carter administration distinguished between signatories and nonsignatories. And the Carter administration's pressure against all four countries was sufficient to reduce human rights violations where they occurred. Public concern followed by coercion, not the human rights treaties, is the explanatory factor here.").

Notwithstanding its reputation, during the last fifteen years several countries have challenged the Inter-American Human Rights System. In 1998, the Republic of Trinidad and Tobago notified the Organization of American States (OAS) of its denunciation of the American Convention on Human Rights.<sup>3</sup> In 1999, Peru withdrew its recognition of the contentious jurisdiction of the Inter-American Court, recognizing it again in 2001.<sup>4</sup> More recently, Venezuela denounced the American Convention on Human Rights in 2012.<sup>5</sup> In addition to these events, from 2011 to 2013 the Inter-American system faced a crisis—a revision procedure was set up to reform the system in order to, euphemistically, strengthen it<sup>6</sup>—and although the crisis has nominally been resolved, the challenge to the system’s effectiveness remains.

These recurring problems are enough to show that the interaction among the different stakeholders—namely states, human rights non-governmental organizations, the Commission, the Court and the Organization of American States which functions as the institutional shelter of the Inter-American system—is far from being pacific. As they have no influence over either the sword or the purse<sup>7</sup> in regional politics, the Commission and the Court are at the center of intense disputes with no leverage other than their own ability to build up their legitimacy.

This persistent crisis of the Inter-American system raises a perplexing question for scholars and practitioners: is there any way to prevent these disruptions? Maybe the system was designed precisely to generate conflict, to allow an external party to examine states’ human rights abuses, and the best we can do is to learn how to live with the situation. It might well be that these types of clashes are the ones that every human rights institution should be in the midst of, if it embodies its role in a consistent manner.

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3. Organization of American States [OAS], American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]. Trinidad and Tobago notified the OAS on May 26, 1998. OAS, *B-32: American Convention on Human Rights: Declarations/Reservations/Denunciations/Withdrawals*, Inter-Am. Comm’n Hum. Rts., <http://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm#21>.

4. *See id.* The withdrawal was on July 8, 1999. It re-recognized the jurisdiction on January 29, 2001.

5. *See* American Convention, *supra* note 5; OAS, Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, Sept. 6, 2012.

6. About the strengthening process and a brief description and links to the main documents, *see* OAS, *Process for Strengthening the IACHR: Methodology*, <http://www.oas.org/en/iachr/mandate/strengthening.asp>.

7. THE FEDERALIST NO. 78, 425 (Alexander Hamilton).

While this answer is possible, I will argue in this Article that the Inter-American system might be trapped in the boundaries of its own mental scheme. Operators of the system are part of the larger human rights movement, and perhaps, as David Kennedy has argued,<sup>8</sup> they are oversimplifying complex conflicts in uncomplicated stories of villain states, innocent victims and heroic human rights defenders. From a related but different perspective, it may be that the straightforward process of violation of absolute rights and suitable reparations is incapable of recognizing the multiple nuances of long standing problems.<sup>9</sup>

To escape this trap of inevitable inefficacy, I will suggest there is a dire need for innovative thinking. It would be wise to enhance the Commission's political attributions rather than persisting in strengthening its adjudicative functions. The first section of this Article will briefly analyze the Inter-American system and its two main bodies, the Commission and the Court. After that, I will describe the causes of its current crisis, and the roles that Venezuela, Brazil and the United States played. In the next part, I will point out some conceptual tools upon which my proposal of intensifying the political face of the Commission is built: I believe we are facing a favorable occasion to rethink the analytical foundations of human rights activism and strategy. The world has changed in almost every possible way from the one the human rights movement faced after World War II, when the idea of international protection of human rights took off. In this sense, new modifications might require different tools for action. In the following chapter, I will try to retrieve the original intent for the Inter-American Commission—which I suggest was closer to a political body than a quasi-judicial body—and I will describe one successful case of its performance of political functions. Next, I will suggest that the lessons from the past support the idea that the Commission should give its political functions at least as much importance as its adjudicative functions. Finally, I will present a theoretical problem to be solved in further investigations—why do some measures generate compliance, whereas other generate crisis?

A disclaimer: I will not propose what everybody knows would be positives for the system, such as a larger budget or permanent commissioners. My aim in this Article is to suggest elements that might strengthen the Commission without significant institutional reform of the system. Although such a reform would be desirable, it currently seems a utopian goal.

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8. See KENNEDY, *supra* note 2, at 4-35.

9. Stephan Sonnenberg & James L. Cavallaro, Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights, 39 WASH. U.J.L. & POL'Y, 257, 300 (2012).

## I. THE INTER-AMERICAN SYSTEM AND THE CURRENT CRISIS

### A. *Brief Description of the Inter-American System of Human Rights*

The conjunction of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights is usually referred to as the Inter-American System of Human Rights. It is institutionally sheltered by the OAS, the multilateral organism that includes every American state but Cuba.<sup>10</sup>

The OAS was founded in 1948 as an international institution based on the classic principles of international law—non-intervention and states' sovereign equality.<sup>11</sup> It was one of a number of post-1945 projects to establish multilateral organisms to secure peace through cooperation.<sup>12</sup> In this trend, the human rights idea played a major role<sup>13</sup> and it was little surprise that fundamental rights—as they were called—were mentioned in the Bogotá Charter of 1948, the founding instrument of the OAS.<sup>14</sup>

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10. The OAS was founded in 1948, after the adoption of the Charter of the OAS, in Bogotá, Colombia. *See generally*, Hugo Martínez de Zela, *The Organization of American States and its Quest for Democracy in the Americas*, 8 YALE J. INT'L AFF. 23 (2013). Cuba was suspended from the OAS in 1962. OAS, *Final Act of the Eighth Meeting of Consultation of Ministers of Foreign Affairs*, at 12, OEA/Ser.C/11.8 (Jan. 22-31, 1962). The suspension was lifted in 2009, through Resolution 2438. OAS, *Resolution on Cuba*, AG/RES. 2438 (XXXIX-O/09) (June 9, 2009). Nevertheless, Cuba rejected to rejoin the OAS. *See, Cuba rejects OAS membership, officials say*, CNN.COM, <http://www.cnn.com/2009/WORLD/americas/06/04/cuba.oas/> (June 4, 2009, 2:16 p.m.).

11. Charter of the Organization of American States [OAS Charter], preamble, arts.1, 5, Apr. 30, 1948, 2 U.S.T. 2394, 199 U.N.T.S. 3 (entered into force 13 Dec. 1951) available at the Avalon Project web-site [http://avalon.law.yale.edu/20th\\_century/decad062.asp](http://avalon.law.yale.edu/20th_century/decad062.asp).

12. John G. Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT'L ORG. 561, 584 (1992). According to Ruggie, states organize their relations among them based not only in their own self-interest but also in some shared principles that order their interactions. The principles that sustain this type of arrangement engenders what Ruggie, following Keohane, calls a "diffuse sense of reciprocity." This means states create multilateral arrangements because they believe that in the long run the system will beneficiate them, even though they might not obtain a particular advantage in every single interaction. Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1 (1986) (discussing the idea of diffuse reciprocity).

13. Mary Ann Glendon, *A World Made New* (2001).

14. OAS Charter, *supra* note 12, art. 5 (j): "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."

In parallel, the American Declaration of the Rights and Duties of Man,<sup>15</sup> adopted in 1948 alongside the OAS Charter, crystalized the commitment of American States to the emerging idea of human rights in a written promise. This document, nonetheless, did not create any machinery to enforce its provisions. Moreover, its legal condition—an international declaration—gave no reason for states to consider it as a legally binding document.<sup>16</sup>

However, twelve years later, in 1960, the OAS Council established the Inter-American Human Rights Commission (the Commission).<sup>17</sup> Although the Commission was created to promote the rights contained in the American Declaration, its initial mandate was limited to preparing country studies.<sup>18</sup> The American Convention on Human Rights,<sup>19</sup> adopted in 1978, represented a significant advance for the regional protection of victims. It not only established a complete catalogue of human rights but also empowered the Commission as a treaty-based body and created a court to adjudicate cases against those states willing to accept its jurisdiction.<sup>20</sup> The institutional machinery of the Inter-American system essentially followed the European regional pattern.<sup>21</sup>

### 1. The Inter-American Commission on Human Rights

The Commission consists of seven members who represent Member States of the OAS.<sup>22</sup> They are elected by the General Assembly of the OAS,

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15. American Declaration on the Rights and Duties of Man [American Declaration], O.A.S. Res. XXX, May 2, 1948.

16. Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q. 856 (2009).

17. Hector Faundez Ledesma, *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos Institucionales y Procesales* [The Interamerican Human Rights Protection System: Institutional and Procedure Aspects] 34 (3d ed. 1999).

18. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L. L. 783, 794 (2006).

19. American Convention, *supra* note 4.

20. *Id.* ch. VII & VIII.

21. Goldman, *supra* note 17, at 866.

22. American Convention, *supra* note 4, arts. 34–35. This provision has no parallel in chapter VIII of the American Convention, when referring to the Inter-American Court. In a way, and since the beginning—a similar clause appears in the Rules of Procedure of 1966, article 1—the Commission seems to be shaped not as an independent judge but as an interested party.

from a list of candidates proposed by the governments of the states.<sup>23</sup> The Commissioners' term lasts four years, with a possibility of one re-election.<sup>24</sup>

The permanent staff of the Commission is lead by an Executive Secretary, who is appointed by the Secretary General of the OAS.<sup>25</sup> Although the Executive Secretary is, in principle, an administrative leader, its power is reinforced by the fact that the Commissioners' jobs are part-time: they are not required to reside in Washington, D.C. but just to travel the sessions. They do not receive salary for their dedication.<sup>26</sup> Thus, from a functional point of view, the Executive Secretary can lead the institution in shaping its agenda.<sup>27</sup>

The functions of the Commission have developed during its history. In its origins the Commission was thought of more as a study group than as the quasi-judicial body it is today.<sup>28</sup> But its broad mandate—to "promote respect for and defense of human rights" in the Americas<sup>29</sup>—has allowed the Commission to significantly increase its scope of action.

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23. American Convention, *supra* note 4, art. 36.

24. *Id.* art. 37.

25. OAS, *Statute of the Inter-American Commission on Human Rights*, Oct. 1, 1979, O.A.S. Off. Rec. No. 447, OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, art. 21.

26. *Id.* art. 13.

27. An example of this is the duty of the Executive Secretary, who drafts the budget of the Commission with the Chairman. See OAS, *Rules of Procedure of the Inter-American Commission on Human Rights*, art. 12(1)b, Inter-Am. Comm'n H.R. (2009-2013), available at <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

28. This is the thesis of one of the first commentators on the Inter-American Commission. See José Cabranes, *The Protection of Human Rights by the Organization of American States*, 62 AM. J. INT'L L., 889, 894 (1968).

29. American Convention, *supra* note 4, art. 41. In particular, art. 41 details several functions:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;

From 1960 to present day, the Commission's functions have evolved and enlarged. Currently, the Commission undertakes a wide array of tasks: it issues recommendations in individual cases<sup>30</sup> and it can present cases before the Inter-American Court of Human Rights if the concerned states do not follow the recommendations.<sup>31</sup> It has also established several rapporteurships to pay special attention to topics such as freedom of speech or rights of children.<sup>32</sup> It adopts reports on particular countries or on particular subjects within a country.<sup>33</sup> The Commission can also order precautionary measures.<sup>34</sup> These measures are urgent requests, directed to an OAS Member State, to take immediate action in serious and urgent cases to prevent a grave and irreparable harm.<sup>35</sup> The Commission also performs *in-loco* observations—on-site visits to member states with various purposes such as interviewing victims, collecting testimonies or generating public pressure on a particular country “with the consent or at the invitation of the government

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f. to take action on petitions and other communications pursuant to its authority under the provisions of art. 44 through 51 of this Convention; and

g. to submit an annual report to the General Assembly of the Organization of American States.

30. American Convention, *supra* note 4, art. 50.

31. *Id.* arts. 57, 61.

32. Since 1990, the Commission started creating thematic rapporteurships to focus on particular rights or vulnerable group. This would enhance the Commissions task. *See generally*, OAS, *Thematic Rapporteurships and Units*, Inter-Am. Comm'n H.R., <http://www.oas.org/en/iachr/mandate/rapporteurships.asp>. Currently, there are nine rapporteurships, in charge of one Commissioner each (on economic, social and cultural rights; on the rights of indigenous people; on the rights of women; on the rights of migrants; on the rights of the child; on human rights defenders; on the rights of persons deprived of liberty; on the rights of afro-descendants and against racial discrimination; on the rights of lesbian, gay, trans, bisexual and intersex persons) and one special rapporteurship for freedom of expression, whose head is an external expert distinct from a Commissioner.

33. American Convention, *supra* note 4, art. 41.

34. The American Convention does not expressly recognize precautionary measures. This type of quasi-judicial measure was established for first time in art. 25 of the rules of the 1980s rules of procedure. OAS, *Precautionary Measures*, Inter-Am. Comm'n H.R., <http://www.oas.org/en/iachr/decisions/precautionary.asp>; *See also* OAS, *Reglamento de la Comision Interamericana de Derechos Humanos [Rules of Procedure of the Inter-American Commission on Human Rights]*, Apr. 8, 1980, OEA/Ser. L/V/II.49, doc. 6 rev. 4. According to Faundes Ledesma, since 1996 it is possible to note an increasing number and importance of the use of this mechanism by the Commission. FAUNDES LEDESMA, *supra* note 18, at 371.

35. Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 28, art. 25.



in question.”<sup>36</sup> Lastly, the Commission presents a yearly report on the situation of human rights in the Americas, the content of which accounts for all activities performed by the Commission. The report includes a chapter that identifies the states whose human rights record deserves in depth attention.<sup>37</sup>

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36. Statute of the Inter-American Commission on Human Rights, *supra* note 26, art. 18(g).

37. The Commission has drafted reports since its very beginning. According to the Commission's recount, since 1977 it has considered that some states deserved particular concern. In 1997 the Commission established five criteria to include states in this chapter:

1. The first criterion encompasses those states ruled by governments that have not come to power through popular elections, by secret, genuine, periodic, and free suffrage, according to internationally accepted standards and principles. The Commission has repeatedly pointed out that representative democracy and its mechanisms are essential for achieving the rule of law and respect for human rights. As for those states that do not observe the political rights enshrined in the American Declaration and the American Convention, the Commission fulfills its duty to inform the other OAS members states as to the human rights situation of the population.

2. The second criterion concerns states where the free exercise of the rights set forth in the American Convention or American Declaration have been, in effect, suspended totally or in part, by virtue of the imposition of exceptional measures, such as state of emergency, state of siege, suspension of guarantees, or exceptional security measures, and the like.

3. The third criterion to justify the inclusion in this chapter of a particular state is when there is clear and convincing evidence that a state commits massive and grave violations of the human rights guaranteed in the American Convention, the American Declaration, and all other applicable human rights instruments. In so doing, the Commission highlights the fundamental rights that cannot be suspended; thus it is especially concerned about violations such as extrajudicial executions, torture, and forced disappearances. Thus, when the Commission receives credible communications denouncing such violations by a particular state which are attested to or corroborated by the reports or findings of other governmental or intergovernmental bodies and/or of respected national and international human rights organizations, the Commission believes that it has a duty to bring such situations to the attention of the Organization and its member states.

4. The fourth criterion concerns those states that are in a process of transition from any of the above three situations.

5. The fifth criterion regards temporary or structural situations that may appear in member states confronted, for various reasons, with situations that seriously affect the enjoyment of fundamental rights enshrined in the American Convention or the American Declaration. This criterion includes, for example: grave situations of violations that prevent the proper application of the rule of law; serious institutional crises; processes of institutional change which have negative consequences for human rights; or grave omissions in the adoption of the provisions necessary for the effective exercise of fundamental rights.

## 2. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights was established in 1978, when the American Convention on Human Rights entered into force.<sup>38</sup> The establishment of the Court represented a benchmark in the history of the Inter-American System, as it was designed to be able to issue binding decisions that states undertook to fulfill in all cases to which they are parties.<sup>39</sup>

Like the Commission, the Court has seven members. They are all judges, who must be qualified for the highest judicial court of their native country, selected by the General Assembly of the OAS.<sup>40</sup> They are appointed for six years with the possibility of one re-election.<sup>41</sup>

The role of the Court starts after the Commission has issued a report under Art. 50 of the Convention “setting forth the facts and stating its conclusion,”<sup>42</sup> whether there has been a violation or not. If the state does not follow the recommendation, the Commission will subsequently present the case before the Court<sup>43</sup> in order to obtain a binding decision.<sup>44</sup> The procedure before the Court is, basically, a judicial procedure in which the state is the defendant, and the Commission—not the victim—is the main plaintiff,<sup>45</sup> as only the Commission can bring the case before the Court. There is a trend, however, to increase the significance of the role of the victim before the Court. In such a way, although victims cannot enjoy the Court’s jurisdiction, once the case has been sent by the Commission, they can “submit their brief containing pleadings, motions, and evidence autonomously and

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See Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.98, doc. 6, ch. V., rev. Apr. 13, 1998, available at <http://www.cidh.org/annualrep/97eng/chap.5.htm>.

38. On the history of the Court, see Inter-Am. Ct. Hum. Rts., *I/A Court History*, <http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh>.

39. American Convention, *supra* note 4, art. 68.

40. *Id.* art. 53.

41. *Id.*

42. *Id.* art. 50.

43. Under art. 45 of the 2013 Rules of Procedure, the Commission will present the art. 51 report by default—this is, it will refer the case to the Court unless by a reasoned decision it decides not to do so. See *Rules of Procedure of the Inter-American Commission on Human Rights*, *supra* note 28.

44. American Convention, *supra* note 4, art. 61. The Inter-American Court, interpreting article 61, stated that a government cannot waive the fulfilment of the regular procedures set forth in article 61 of the American Convention. See *Viviana Gallardo v. Gov’t of Costa Rica*, Advisory Opinion G. 101/81, Inter-Am. Ct. H.R. (ser. A) No. 101, ¶ 12-25 (Nov. 13, 1982).

45. Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 28, art. 45.

shall continue to act autonomously throughout the proceedings.”<sup>46</sup> As a secondary feature the Court also has advisory jurisdiction.<sup>47</sup> In this sense, the Court is in charge of responding to consultations that member states or organs of the OAS make “regarding the interpretation of [the] Convention or of other treaties concerning the protection of human rights in the American states.”<sup>48</sup>

### B. *The Current Crisis of the System*

Recent years have been difficult for the Inter-American Human Rights System. Several state parties to the OAS have constantly criticized the Commission, and in April 2012, a process for reforming the system, euphemistically named “Process of Strengthening of the Inter-American System for the Protection of Human Rights,” took off.<sup>49</sup> This process grew out of instability in the system and, though the crisis has nominally been resolved, major challenges remain.

Although it is not easy to clarify all the reasons for the full revision of the system, three precise problems unleashed the difficulties. The first problem was that countries such as Nicaragua, Ecuador, and especially Venezuela<sup>50</sup> denounced what they called an excessive intervention by the Commission in their internal affairs.<sup>51</sup> These states were particularly vocal about what they saw as over-reaching by the Commission’s Special Rapporteur for Freedom of Speech. Indeed, the continuous scrutiny over its internal situation led Venezuela to withdraw from the American Convention

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46. *Id.* art. 25 (1).

47. American Convention, *supra* note 4, art. 64.

48. *Id.*

49. For the a brief description and history of the procedure, see generally Process for Strengthening the IACHR: Methodology, *supra* note 7; See also, Claudio Grossman, The Future of the Inter-American System of Human Rights: Introduction, 20 HUM. RTS. BRIEF 2 (2012-2013).

50. Venezuela’s late presidente Hugo Chávez had a long story with the Inter-American Commission on Human Rights, and specially with its executive secretary from 1999 until 2012, Santiago Cantón. According to late President Chávez, the Commission approved the failed coup of 2002. The Commission always denied these allegations, saying that it immediately condemned the strike. On this issue, for the Commission’s story, see OAS, *Report on Democracy and Human Rights in Venezuela*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II., doc. 54, ¶ 3, 7 (Dec. 30, 2009). For Venezuela’s side, see Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, *supra* note 6, at 6, 18.

51. Jackson Diehl, Opinion, *Will the Inter-American Commission on Human Rights be gutted?*, WASH. POST, Mar. 3, 2013, [http://articles.washingtonpost.com/2013-03-03/opinions/37418252\\_1\\_oas-ministers-rafael-correa-jose-miguel-insulza](http://articles.washingtonpost.com/2013-03-03/opinions/37418252_1_oas-ministers-rafael-correa-jose-miguel-insulza).

on Human Rights.<sup>52</sup> The displeasure of these States towards the Rapporteur for Freedom of Speech is not surprising, since such states have questioned the post-World War II liberal model of democracy.<sup>53</sup> Freedom of expression is a core value within the liberal democratic political system.<sup>54</sup> Thus, freedom of expression came under fire.

The second problem was the United States' persistent refusal to ratify the American Convention on Human Rights (although it signed the American Declaration).<sup>55</sup> The lack of U.S. ratification enabled many States, led by Venezuela, Ecuador and Nicaragua, to argue that the Inter-American System was an instrument of U.S. imperialism.<sup>56</sup> The U.S., they suggested, was using the system to manipulate Latin-American states while not allowing itself to be controlled by the same rules.<sup>57</sup> This claim for equality is not new in international law. Precisely, the idea of a sovereign state allowing external control rests upon the basis of every other sovereign doing the same.<sup>58</sup> The claim for universality—one of the basic pillars of the human rights idea—was thus grossly undermined by the refusal of the most powerful state in the region to follow the rules like everybody else.<sup>59</sup>

52. In the Note of Denunciation, *supra* note 51, at 3, Venezuela argued that:

[I]n recent years the practices of the organs governed by the Pact of San José, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, have distanced themselves from the sacred principles they are called upon to protect. They have become a political weapon aimed at undermining the stability of specific governments, especially our country's, by adopting lines of action that interfere in the internal affairs of our government, violating and ignoring the basic, essential principles widely recognized in international law.

53. Bruce W. Jentleson, The John Homes Memorial Lecture: Global Governance in a Copernican World, 18 *GLOBAL GOVERNANCE* 133, 137 (2012).

54. Claudio Grossman, former president of the Commission, has stated “[s]ome countries view classical notions of human rights law, such as an independent judiciary, separation of powers, and freedom of expression, as contrary to their political projects.” See Grossman, *supra* note 50, at 3.

55. The United States signed the American Convention on June 1, 1977 but it never ratified the Convention. Canada is in a worse position than the U.S.; Canada never even signed the American Convention.

56. See, Note of Denunciation, *supra* note 51, at 20-21.

57. Francisco J. Rivera Juaristi, U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System, 20 *HUM. RTS. BRIEF* 19 (2013).

58. Beth A. Simmons suggests a critical factor for States to ratify a human rights treaty is the practices of other states in the region. Beth A. Simmons, *Reflections on Mobilizing for Human Rights*, 44 *N.Y.U. J. INT'L L. & POL.* 729, 741-742 (2012).

59. Goodman and Jinks suggest that “inclusive membership in human rights IGOs helps express that universalizing message.” RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW*, 101 (2013). Relevant to this point, Harold Koh states that the US long-maintained practice of not

The third problem arose when the Commission compromised Brazil's support, after the *Belo Monte* case. Brazil's attacks to the system had a strong effect, distinct from those of Venezuela and the U.S., because it came from one of the Commission's allies. *Belo Monte* is world's third-biggest hydroelectric project. Located on the Xingu River, its construction was supposed to affect several indigenous communities.<sup>60</sup> On April 11, 2011, the Commission granted precautionary measures in favor of the members of these communities—precautionary measures are urgent measures adopted by the Commission to protect a human right from a grave and imminent violation.<sup>61</sup> These measures requested Brazil to suspend the “the licensing process for the Belo Monte Hydroelectric Plant project and [to] stop any construction work from moving forward until certain minimum conditions are met.”<sup>62</sup> As it is possible to see, the Commission was ordering Brazil to stop a third party, foreign to the Commission's procedure—the corporation in charge of building the damn—from continuing its activities.

Brazil had such a strong reaction against these precautionary measures<sup>63</sup> that the Commission, a mere three months later, reviewed the measures, withdrew its request to suspend the construction of the project, and only left the precautionary measures regarding the protection of the “lives, health, and physical integrity” of the communities in voluntary isolation. It

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ratifying human rights treaties undermines US moral leadership and puts it with the worst companions. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1485-86 (2003).

60. *The rights and wrongs of Belo Monte*, THE ECONOMIST, May 4, 2013, <http://www.economist.com/news/americas/21577073-having-spent-heavily-make-worlds-third-biggest-hydroelectric-project-greener-brazil>.

61. Regarding precautionary measures, see Felipe Gonzalez, *Urgent Measures in the Inter-American System*, 7 SUR: INT'L J. HUM. RTS. 51 (2010).

62. Indigenous Communities of the Xingu River Basin, Pará, Brazil, Inter-Am. Comm'n H.R., PM 382/10, OEA/Ser.L/V/II. doc. 69, ¶¶ 32-33 (2011). The conditions requested by the Commission were for the State to: (i) conduct a good faith and informed consultation process, in accordance to Brazil's international obligations; (ii) and to secure the life and physical integrity of the members of indigenous people in voluntary isolation, which might suffer diseases for the affluence of people and as well as some water related diseases.

63. The Foreign Affairs Minister issued declarations saying that the Commission's request was premature and unjustified. Press Release, Ministério das Relações Exteriores, Solicitação da Comissão Interamericana de Direitos Humanos (CIDH) da OEA, (Apr. 5, 2011), available at <http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/solicitacao-da-comissao-interamericana-de-direitos-humanos-cidh-da-oea/?searchterm=belo%20monte>. In English see, *Brazil rejects request to halt Belo Monte dam in Amazon*, BBC, (Apr. 6, 2011), <http://www.bbc.co.uk/news/world-latin-america-12990099>.

urged Brazil to implement the plan Brazil alleged it was already implementing when the first measures were granted—making the capitulation a bit ironic.<sup>64</sup>

The Brazilian case showed two legal problems. On the one hand, the very idea of precautionary measures, which has no legal base either in the American Convention or in the Commission Statute, was challenged. On the other hand, the Commission construed the language of its own rules of procedure too broadly in order to expand the reach of precautionary measures,<sup>65</sup> revealing a pattern that allowed member states to criticize the

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64. See, *The rights and wrongs of Belo Monte*, *supra* note 61, at ¶ 33. For the Commission, this was an elegant retreat: it kept some of the measures, but it opened the door for Brazil to pursue the project.

65. Art. 25 of the Rules of Procedure in place when PM 382/10 were issued stated:

Precautionary Measures.

1. In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case.
2. In serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons under the jurisdiction of the State concerned, independently of any pending petition or case.
3. The measures referred to in paragraphs 1 and 2 above may be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group, or a community with identified or identifiable members.
4. The Commission shall consider the gravity and urgency of the situation, its context and the imminence of the harm in question when deciding whether to request that a State adopt precautionary measures. The Commission shall also take into account:
  - a. whether the situation of risk has been brought to the attention of the pertinent authorities or the reasons why it might not have been possible to do so;
  - b. the individual identification of the potential beneficiaries of the precautionary measures or the identification of the group to which they belong; and
  - c. the express consent of the potential beneficiaries whenever the request is filed before the Commission by a third party unless the absence of consent is duly justified.
5. Prior to the adoption of precautionary measures, the Commission shall request relevant information to the State concerned, unless the urgency of the situation warrants the immediate granting of the measures.
6. The Commission shall evaluate periodically whether it is pertinent to maintain any precautionary measures granted.
7. At any time, the State may file a duly grounded petition that the Commission withdraws its request for the adoption of precautionary measures. Prior to the adoption of a decision on the State's petition, the Commission shall request obser-

Commission, for not conforming its behavior to its mandate.<sup>66</sup>

Despite its reasoning's lack of a strong treaty basis, the Inter-American Court has recognized the power of the Commission to grant precautionary measures. In the case of the *Penitenciarías de Mendoza*, the Commission had granted precautionary measures to protect the lives of numerous inmates sentenced in the Mendoza (Argentina) penitentiary. Nevertheless, some of them died. The Commission considered that the state was not complying with its decision, and so requested the Court to issue provisional measures in favor of the victims. Provisional measures are an injunctive relief that the Inter-American Court can adopt in cases "of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons."<sup>67</sup> It should be highlighted that provisional measures are mentioned in the American Convention.<sup>68</sup>

The Court stated that in order to protect human rights states must give the decisions of both the Commission and the Court enough *effet utile*. In such manner, states must implement and comply with their decisions. "Subsequently, the presentation before the Court of Provisionary Measures by the Commission is no reason for the State not to adopt the actions in order to attend the request for precautionary measures."<sup>69</sup>

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ventions from the beneficiaries or their representatives. The submission of such a petition shall not suspend the enforcement of the precautionary measures granted.

8. The Commission may request relevant information from the interested parties on any matter related to the granting, observance, and maintenance of precautionary measures. Material non-compliance by the beneficiaries or their representatives with such a request may be considered a ground for the Commission to withdraw a request that the State adopt precautionary measures. With regard to precautionary measures of a collective nature, the Commission may establish other appropriate mechanisms of periodic follow-up and review.

9. The granting of such measures and their adoption by the State shall not constitute a prejudgment on the violation of the rights protected by the American Convention on Human Rights or other applicable instruments.

See OAS, *Rules of Procedure of the Inter-American Commission on Human Rights*, Inter-Am. Comm'n Hum. Rts. (2009), available at <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr2009.asp>.

66. Note of Denunciation, *supra* note 51, at 17.

67. American Convention, *supra* note 4, art. 63 (2).

68. *Id.*

69. *Penitenciarías de Mendoza respecto de la República de Argentina, Medidas Provisionales*, Resolución de la corte, Inter-Am. Ct. H.R., (ser. E) "Vistos," ¶ 16 (Nov. 22, 2004), [http://www.corteidh.or.cr/docs/medidas/penitenciariamendoza\\_se\\_01.pdf](http://www.corteidh.or.cr/docs/medidas/penitenciariamendoza_se_01.pdf).

Precautionary measures were, however, usually understood to deal with the most urgent matters, able to produce an irreparable damage.<sup>70</sup> And in the *Belo Monte* case, although it was true that the project required the displacement of some communities from their traditional lands, the situation did not seem grave enough to demand protection through precautionary measures, according to a strict construction of the text of the rules of procedure.<sup>71</sup>

The conjunction of these three situations resulted in the crisis. To deal with it, states set up the aforementioned strengthening process. Within the process, the complaining States articulated six basic claims to reform the system:<sup>72</sup> (i) a new procedure to appoint the Executive Secretary of the Inter-American Commission; (ii) an increase in transparency and predictability of the system of precautionary measures; (iii) a promotion of the efficiency and transparency in the management mechanisms of the Commission regarding individual cases; (iv) a prioritization of friendly settlements; (v) a revision of the criteria for including states deserving special attention in the annual report of the Commission; and (vi) a financial strengthening of the Inter-American Human Rights System.

As a general response, on March 18, 2013, the Commission approved Resolution 1/13 on the Reform of the Rules of Procedure, Policies and Practices, which addressed these concerns.<sup>73</sup> On March 23, 2013 the OAS General Assembly adopted a resolution to conclude the process.<sup>74</sup> While the Commission showed political will to make changes, the same lacked on the

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70. In 1996 the Commission decided to include for first time in its annual report a section on precautionary measures “under the provisions of Article 29 of its [1980] Rules of Procedure, in cases of extreme gravity and urgency in which it is necessary to avoid irreparable damage to persons.” Inter-Am. Comm’n H.R., Annual Report, OEA/Ser.L/V/II.95,?doc. 7, ch. 2, ¶ 4 rev.?(Mar. 14, 1997). The Commission has, however, issued precautionary measures in circumstances that would not be considered as grave, such as cases regarding electoral process or property rights related to freedom of expression. FAUNDEZ LEDESMA, *supra* note 18, at 377-380.

71. Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 28.

72. Report of the Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System for consideration by the Permanent Council, OEA/Ser.G GT/SIDH-13/11 rev. 2, (Dec. 13, 2011). The final document showed the comments and concerns of a wide array of participants in the process: States, the Commission, and civil society organization.

73. OAS, *Reform of the Rules of Procedure, Policies and Practices*, Inter-Am. Comm’n H.R., Res. 1/13, (Mar. 18, 2013).

74. Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American



states' side. Thus, not many of the flaws were really addressed. The Commission clarified its standards for issuing precautionary measures,<sup>75</sup> and slightly changed the procedure to nominate the executive secretary.<sup>76</sup> However, the U.S. has not ratified the American Convention, the Commission's budget has not risen<sup>77</sup> and, consequently, the Commission keeps trying to deal with an unmanageable workload risking discredit for not being able to provide resolutions in a timely fashion.<sup>78</sup>

Therefore, the problem does not seem to be in the Commission's management failure or in its weak accountability. These are minor issues that can easily be adjusted. The actual question is whether states have political will to be supervised by the Commission and the Court or not. The challenge, then, is how to increase states' political will. In the next section I will paint a scenario that must be understood in order to successfully play the human rights game. Rules have changed, and the Commission might need to adapt to them in order to thrive.

## II. HUMAN RIGHTS: DYNAMICS, PLAYERS AND WEAKNESSES

### A. *Times are Changing: Three Features of Human Rights' Dynamics Today*

The world has changed significantly over the last sixty years. The Cold War is over, China has emerged as a super-power, and the universality of human rights has been questioned.<sup>79</sup> In this chapter, I will argue that, in

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Human Rights System, Inter-Am. Comm'n H.R., OEA/Ser.P AG/RES. 1 (XLIV-E/13) rev. 1 (Jul. 23, 2013).

75. See Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 28, art. 25.

76. See *id.* art. 11.

77. For a general description of the financial situation of the Commission, see María Claudia Pulido, *Budgetary and Financial Challenges Facing the Inter-American Commission on Human Rights of the OAS*, DPLF, 16 APORTES DPLF 59 (2012).

78. The IACHR strategic plan for 2011-2015 indicates that the average time for an individual petition to go through the admissibility and merits phases is of 6 years. We should add to this the time for the initial evaluation, for which the information is that there is a significant backlog. See Inter-Am. Comm'n H.R., *Strategic Plan 2011-2015*, 44 (2016). At the end of 2012, there were 7208 petitions pending of initial evaluation. Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.147 Doc. 1, ch. III, chart G, 54 (Mar. 5, 2013).

79. Jentleson, *supra* note 54. Regarding the universality of the human rights idea, the immediate efforts post-1945 to secure human rights enjoyed wide consensus. Julien Huxley, then director of the United Nations Educational, Social and Cultural Organization (UNESCO), "created a committee to investigate whether there were areas of potential agreement among the world's varied cultural, religious, and philosophical

order to improve the efficacy of the Commission, it would be appropriate to pay attention to new developments—quiet and bloodless revolutions—that the world has experienced. These developments include: (i) the global governance process as a way of providing collective goods; (ii) the entrance of new actors in the field of international politics; and (iii) the evolution of international law.

These three transformations have redefined the way in which human rights protection is to be achieved. A salient feature of international law is the absence of a world government to enforce it.<sup>80</sup> The lack of an enforcing authority and, at the same time, the impression of some sort of order in the world—or at least not a total chaos—paved the way to the emergence of the idea of a global governance. This idea developed as a concept capable of describing the range of both informal and formal values, norms, and institutions that deliver some order and predictability in the world.<sup>81</sup> In this sense,

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traditions.” MARY ANN GLENDON, *THE FORUM AND THE TOWER. HOW SCHOLARS AND POLITICIANS HAVE IMAGINED THE WORLD, FROM PLATO TO ELEANOR ROOSEVELT* 203 (2011). To build that consensus, however, philosophers from all over the world focused on the practical aspects of human rights instead of their foundation. In such a way, Maritain—who had a great influence in the project—wrote:

“How,” I asked, “can we imagine an agreement of minds between men who are gathered together precisely in order to accomplish a common intellectual task, men who come from the four corners of the globe and who not only belong to different cultures and civilizations, but are of antagonistic spiritual associations and schools of thought. . . .?” Because, as I said at the beginning of my speech, the goal of UNESCO is a practical goal, agreement between minds can be reached spontaneously, not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man and of knowledge, but upon the affirmation of a single body of beliefs for guidance in action.

JACQUES MARITAIN, *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS*, 9-17 (Allan Wingate, 1949). Among the respondents were figures such as Mahatma Gandhi, Benedetto Croce, E. H. Carr, Chung-Shul Lo, and Aldous Huxley. See GLENDON, *THE FORUM AND THE TOWER* 203.

80. Thomas G. Weiss, *What Happened to the Idea of World Government?* 53 *INT’L STUD. Q.* 253 (2009), suggests that the idea of global governance is too weak. In his piece, Weiss discredits the idea of global governance (a soft and informal way of organizing international affairs in a civilized way) as not enough for what the world needs, and supports the idea of a world government (a much stronger idea, that includes agencies and coercion). Weiss emphasizes that global problems need a kind of answer that global governance cannot provide.

81. Klaus Dingwerth and Philipp Pattberg, *Global Governance as a Perspective on World Politics*, 12 *GLOBAL GOVERNANCE* 185, 198 (2006), criticizing the overbreadth that the concept of “global governance” has acquired through literature. Therefore, according to these authors, there is a need to refine the concept. For that reason,

the concept of global governance explains the way in which collective goods, such as human rights or economic stability, are provided at the global level.<sup>82</sup>

The notion of governance requires examining international reality through a multi-actor perspective that permits identification of a diverse array of players who interact at different levels.<sup>83</sup> International law and politics used to be a conversation, precisely, between nations. Not anymore. Individuals, multinational corporations and global non-profit organizations have earned a place as new actors in the table. In such a way, the idea of governance mirrors the dilution of power that allows the manifestation of authorities different from the states which, in classical international law, were the only legitimate subjects.<sup>84</sup> Power, in a functional sense, is now held by the new players.<sup>85</sup> These interactions reflect the fact that, in international politics, horizontal coordination associations take the place of the more traditional vertical and hierarchical relations that belong to the national level.<sup>86</sup>

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they distinguish between the analytical concept of global governance with the term global governance used as a political program. These authors suggest that the concept of global governance has lost some of its ability to fully explain what it means, because it has been widely used that it is at the risk of mean nothing.

82. Weiss, *supra* note 81, at 257.

83. According to Dingwerth and Pattberg, *supra* note 82, at 198, global governance concept is used in opposition to the idea of "inter-national" relations as the only valid perspective in a global state-based system. In such a way, global governance departs from traditional views of international relations in four important ways: (i) Multi-actor perspective; (ii) different levels and interaction; (iii) horizontal coordination; and (iv) new and different authorities. John G. Ruggie, *Reconstituting the Global Public Domain*, 10 EUR. J. INT'L REL. 499, 504 (2004), says that "[g]overnance, at whatever level of social organization it may take place, refers to conducting the public's business—to the constellation of authoritative rules, institutions, and practices by means of which any collectivity manages its affairs."

84. See generally Jentleson, *supra* note 54.

85. See, for example, Larry Cata Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2006-2007); Kim D. Reimann, *A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs*, 50 INT'L STUD. Q. 45 (2006). For a piece elaborated when this phenomenon started to be perceived, see WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, 375-376 (1964).

86. According to Weiss, *supra* note 81, at 254-257, global governance is "the patchwork of formal and informal arrangements among states, international organizations, and various public-private partnerships." In this system, governance "represents the range of both informal *and* formal values, norms, and institutions that provide better

At the same time, the internal-external division has blurred and dialogue occurs at many different levels. For example, a decision of the South African Supreme Court<sup>87</sup> (national) considering whether the minimum core doctrine on social and economic rights, as stated by the International Covenant on Civil and Political Rights Committee<sup>88</sup> (international), is used afterwards by the Colombian Constitutional Court (national) to decide whether the local government can throw some occupiers out of a private property.<sup>89</sup> In the business arena, there is neither in nor out: products are made anywhere and sold everywhere.<sup>90</sup> Norms, products, and people penetrate through boundaries.

The multi-actor perspective helps highlight the fragmentation of governance structures—phenomenon legally translated as the fragmentation of international law.<sup>91</sup> In a few words, this idea refers to the multiple and diverse display of institutions, norms, arrangements and decision-making processes that do not correspond to a universal and fixed order. Regional regimes coexist with universal institutions; private regulations have similar practical effects to public regulations and they do so transnationally; non-profit foundations have higher budgets than some states.<sup>92</sup> These mixed elements generate a new system.

The types of relations between the actors has changed. In this novel system, the dispersion of forums and institutional arrangements, both at the universal and regional levels, creates unprecedented competition among in-

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order than if we relied purely upon formal regulations and institutions.” In such a way, it is more cooperative than hierarchical.

87. Gov’t of the Republic of S. Afr. v. Grootboom & Others, 2001 (1) SA 46 (CC) (S. Afr.).

88. UN Human Rights Committee (HRC), CCPR General Comment No. 3, art. 2 (Implementation at the National Level), (July 29, 1981).

89. Corte Constitucional [C.C.], Sept. 30, 2013, Sentencia T-689/13, Sala Séptima de Revisión de Tutelas de la Corte Constitucional.

90. “C.E.O.’s rarely talk about ‘outsourcing’ these days. Their world is now so integrated that there is no ‘out’ and no ‘in’ anymore.” Thomas L. Friedman, *Made in the World*, N.Y. TIMES, Jan. 28, 2012, at SR11.

91. See generally Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

92. For example, in 2012, The Gates Foundation awarded more grants than the whole World Health Organization’s Budget for 2012-13. See, Bill & Melinda Gates Foundation, Annual Report (2012), available at [http://www.gatesfoundation.org/~media/GFO/Documents/Annual%20Reports/2012\\_Gates\\_Foundation\\_Annual\\_Report.pdf](http://www.gatesfoundation.org/~media/GFO/Documents/Annual%20Reports/2012_Gates_Foundation_Annual_Report.pdf). See World Health Organization [WHO], Program Budget for 2012-2013, available at [http://www.who.int/about/resources\\_planning/programme\\_budget\\_2012\\_13/en/](http://www.who.int/about/resources_planning/programme_budget_2012_13/en/).

stitutions. For instance, OAS competes with the Community of Latin American and Caribbean States (CELAC)<sup>93</sup> to be the most legitimate forum of regional diplomacy; the Group of Twenty,<sup>94</sup> comprised of 19 countries plus the European Union, threatens the legitimacy of the U.N. Security Council.<sup>95</sup> At the human rights level, some countries have expressed willingness to create a new mechanism apart from the OAS system.<sup>96</sup> The same phenomenon that has generated competition between institutional arrangements has also lead to hierarchy based solutions being replaced by cooperation and coordination within the governance system.<sup>97</sup> The lack of strong enforcing authorities makes it difficult for some international actors to play the government part, deciding with *imperium*. The absence of government is substituted with persuasion, bargaining and the search for consensus among the players. In such a way global governance acquires the characteristics of an ongoing dialogue process.

Within the global governance context, the human rights idea tests the basis of the governance process. It is interesting to notice, first, that the human rights concept operates through a distinct rationale: the logic of absolute wrongs and rights, in which bargaining should not be possible.<sup>98</sup> As a matter of fact, human rights cannot admit trade-offs,<sup>99</sup> the beauty of the

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93. Created by the Declaration of the Unity Summit of Latin America and the Caribbean gathered at the Unity Summit, consisting of the 21st Summit of the Rio Group and the 2nd Latin American and Caribbean Summit on Integration and Development (CALC), in the Mayan Riviera, Mexico, on Feb. 23, 2010.

94. The Group of Twenty played a key role in coping with the 2008 financial crisis. Andrew F. Cooper, *The G20 as an Improvised Crisis Committee and/or a Contested 'Steering Committee' for the World*, 86 INT'L AFF. 741 (2010). Its members are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, United States, and European Union. See G20 2016 China, *About G20*, (Nov. 27, 2015), [http://www.g20.org/English/aboutg20/AboutG20/201511/t20151127\\_1609.html](http://www.g20.org/English/aboutg20/AboutG20/201511/t20151127_1609.html).

95. G20 members, *supra* note 95. See also Cooper, *supra* note 95.

96. Press Release, Foreign Relations Ministry, *Ecuador Towards a New Latin American Architecture of Human Rights* (Mar. 20, 2012), <http://cancilleria.gob.ec/ecuador-towards-a-new-latin-american-architecture-of-human-rights/?lang=EN>.

97. Dingwerth and Pattberg, *supra* note 82, at 194, citing Holger Mürle, *Global Governance: Literaturbericht und Forschungsfragen* [Global governance: Literature review and research questions], *INEF Report 32*, Duisburg: Institut für Entwicklung und Frieden [INEF], 1998, pp. 10–11.

98. A strong critique of the human rights movement can be found in KENNEDY, *supra* note 2.

99. On this particular topic, it is worth reading Sonnenberg and Cavallaro. These authors explore the possibility of bringing alternative dispute resolution tools to human rights conflict. As they explain

human rights idea lies, precisely, in its absoluteness. And as a value-based concept, the notion of human rights is hard to combine with consequentialist utilitarian approaches.<sup>100</sup> Thus, human rights lawyers and activists might find the idea of negotiation and compromise problematic. Moreover, the human rights vernacular makes it difficult to find grey zones. There is a remarkable preference for thinking in terms of compliance-noncompliance and winning-losing, rather than agreeable transactions or compromises for mutual benefits.

Human rights conform better to a hierarchical distributional model of adjudication rather than with a cooperative or transactional model that encourages compromise.<sup>101</sup> The previous paragraphs show some sort of mismatching pieces here among human rights and the global governance features. The flexibility of the global governance process clashes with the rigidity of human rights. We need, however, to add other elements to the equation. A better understanding of the players can provide interesting insights.

#### B. *Players: New and Old, Interested and Value-driven*

The second idea worth exploring is related to the performers on the stage of global politics and international law. When the Universal Declaration of Human Rights was adopted, multinational corporations did not have the presence or the power that they exhibit today.<sup>102</sup> Similarly, neither Am-

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[p]erhaps the clearest example of the perceived (and often real) tensions between these two fields has been the “peace versus justice” debate. In its simplest, most irreconcilable form, the clash between conflict resolution advocates and rights practitioners posits that situations of conflict can either be managed by accommodating all parties (including rights abusers) or, instead, by advocating justice (that is, investigation, prosecution, and punishment of rights advocates) regardless of the consequences.

Sonnenberg and Cavallaro, *supra* note 10, at 258.

100. Kenneth Abbott and Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 147 (2002), stress that “value activists are reluctant to accept political trade-offs and compromises.” See JOHN STUART MILL, ON LIBERTY (1859), reprinted in THE BASIC WRITINGS OF JOHN STUART MILL: ON LIBERTY, THE SUBJECTION OF WOMEN AND UTILITARIANISM (Dale E. Miller notes & commentary, The Modern Library 2002) (discussing utilitarianism).

101. In David Kennedy’s view, plausible accommodations among absolute rights holders are not easy. KENNEDY, *supra* note 2, at 17.

102. John G. Ruggie, *Reconstituting the Global Public Domain*, *supra* note 85, at 503; See JOHN G. RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013).

nesty International<sup>103</sup> nor the Human Rights Watch existed.<sup>104</sup> Individuals were slowly emerging as subjects of international law.<sup>105</sup>

A useful classification to understand how these players act consists of dividing them between interest-based actors and value-driven actors.<sup>106</sup> Interest-based actors are those whose rational action is driven by a cost-benefit analysis of the gains that a particular behavior will produce.<sup>107</sup> Value-driven actors, in contrast, base their behavior on moral grounds, on what they see as proper and improper. In that manner, they can be characterized as principle players for whom consequentialist logics are not enough to persuade them to act for a cause.<sup>108</sup> At the international plane, states act to a great extent based on their interest and not on their values.<sup>109</sup> It would be

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103. Amnesty International was founded in 1961. Amnesty International, *Where it all began*, <http://www.amnesty.org/en/who-we-are/history>.

104. Human Rights Watch was created in 1978. Human Rights Watch, *Our History*, <http://www.hrw.org/node/75134>.

105. FRIEDMANN, *supra* note 86, at 375-376 (1964), would say:

The individual, until recently purely an object, not a subject of international law, is now, in certain respects, acquiring legal status, both actively and passively. In international law a far sharper distinction between the corporate and the human individual has to be drawn than in municipal law where for many purposes they can be treated alike. In international law the position of the individual is a problem of the isolated and helpless human being who may be robbed or imprisoned without due process, deprived of his nationality or used as a slave labourer. The counterpart has been, especially since the end of the Second World War, the responsibility of the individual for murder, ill-treatment or conspicuous participation in organized brutality or even, in certain cases, participation and preparation for aggressive war. Individual responsibility in international law can, even after the Nuremberg, Tokyo and Eichman judgments, only extend to a very limited number of individuals, and the principles of such responsibility are as yet very vague and ill-defined. The counterpart of the limited responsibility of the individual in international law is increasing emphasis on individual rights. In this field aspirations far exceed achievements. There is yet no right to nationality, and the many attempts to establish codes of human rights have not gone much beyond declarations, except for the far more specific implementation of human rights and their protection in the European Covenant of Human Rights. But the problem has been posed, and the necessity to protect the individual as such internationally, even against his own state, has become an accepted postulate of international lawyers, and the recurrent subject of international debate. What is needed beyond the strengthening of the rights of the individual in international law is the co-ordination and correlation between the principles governing the individual's responsibility and his rights.

106. See generally Abbott & Snidal, *supra* note 101.

107. *Id.* at 145.

108. *Id.*

109. GOLDSMITH & POSNER, *supra* note 3, and the realist school of international relations. A quite old but extremely powerful critical analysis of the realist thesis—

wrong, however, to underestimate the power of value-based choices in this field: analysis should not be too simplistic, at the risk of overlooking the complexities of state action. In contrast, human rights NGOs are a usual example of value-driven actors—in the sense that, in principle, they will not compromise (e.g. a certain amount of torture is permissible under particular circumstances).<sup>110</sup>

The usual interaction between value-driven and interest-based actors entails an appeal from the former to the latter to behave in a precise manner because that is the proper thing to do. The name and shame strategy of the human rights movement is embedded in this logic.<sup>111</sup> No other benefits are offered to a violator for behaving correctly other than not being accused and shamed as a human rights abuser. In a way, it seems as if the human rights movement were expecting what Tom Farer has called a “moral epiphany,” in which the abuser, after seeing himself publicly exposed, will recognize his wrongs.<sup>112</sup>

The problem, however, of this type of relationship is that it might be willing to accommodate two different approaches to reality which are unquestionably arduous to fit together. While the institutionalization of the human rights idea was the product of a particular moment in history—in which values were brought to the front—as soon as that momentum was gone, states returned to their usual interest-based way of being.<sup>113</sup> Accordingly, NGO callings and pressure on states to force them to respect human rights based on value considerations has not been completely successful

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naked power is the only true when talking about international law—can be seen in Myres McDougal, *Law and Power*, 46 AM. J. INT'L L. 102 (1952).

110. In their interesting article, Abbott & Snidal, *supra* note 101, at 146, explain this idea convincingly: “value actors . . . treat bribery and corruption as moral wrongs, not as consequential goals that can be traded off against other interests.”

111. Sonnenberg and Cavallaro, *supra* note 10, at 262.

112. It is worthwhile quoting the whole paragraph:

From its inception, the international human rights movement has operated on the assumption that the most important means for improving the behavior of delinquent regimes is international public opinion. Although human rights activists often refer merely to the ‘shaming effect’ of exposure, as if a government shown to be torturing and murdering its opponents may experience a kind of moral epiphany or at least be embarrassed into less malignant behavior, their lobbying efforts imply and their private conversations often confirm belief in a more complex chain of causation. While hoping to trigger pressure from morally sensitive and influential sectors within the target state, in most instances the real targets of shaming campaigns are citizens of liberal democratic countries.

Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510, 517 (1997).

113. See GLENDON, *supra* note 80.



with precisely those states they have been pressing the most. The challenge here is to find a solution for this inconsistency. The human rights movement, however, has acknowledged the mismatch. To solve it, it has directed its efforts to convince states of the binding nature of international law.

C. *The Weakness of International Law*

The absence of enforcement authorities places international human rights systems—including the Inter-American System—far away from domestic adjudication machineries. States' obedience to international law depends to a great extent on their will to obey, not on a threat of external enforcement. This is, however, a usual difficulty in international law, and the reason why the subject of compliance and function of international law works has attracted so many scholars.<sup>114</sup>

As a general framework to understand how social control functions, Ian Hurd suggests that there are three types of models that explain compliance with rules: (i) compliance through coercion, (ii) compliance based on self-interest, and (iii) compliance based on the legitimacy of the rules to be followed. The first model, coercion, implies a stronger agent that is able to force a change in the behavior of a weaker agent.<sup>115</sup> The inconvenience of coercion as a system is that it sows resistance—even if, at the end of the day, it produces compliance. In that manner, as soon as the force exercised is not powerful enough, the weaker agent will avoid compliance. When applied to international human rights law, coercion based theories suggest that military power and economic sanctions are the principle manner in which compliance can be achieved.<sup>116</sup>

Self-interest is the second theory. It argues that compliance is achieved through cost-benefit analyses done by the participants, who then commit not to break the law because they acknowledge the convenience of playing by the rules (as against obtaining a negative balance of free-riding the system).<sup>117</sup> The downside of the self-interest model is that players condition their acceptance of the rules on the benefits that can be achieved by them; thus, recalculations take place often. In this system “[a]ctors are constantly recalculating the expected payoff to remaining in the system and stand

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114. See generally, Harold H. Koh, *Why Do Nations Obey International Law?* 106 YALE L. J. 2599 (1997); GOLDSMITH & POSNER, *supra* note 3; GOODMAN & JINKS, *supra* note 60.

115. Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L. ORG. 379, 383 (1999).

116. Goldsmith & Posner, *supra* note 3, at 134.

117. Hurd, *supra* note 116, at 386.

ready to abandon it immediately should some alternative promise greater utility.”<sup>118</sup>

Legitimacy, or authoritative legitimacy, compliance is based on a sense of moral obligation in which rules are respected because they are right. In such instances, the actor that obeys a rule because she thinks it is legitimate will behave by the law as a general principle. Occasional non-compliance is what will break the usual pattern.<sup>119</sup> Although realists reject this approach as utopian,<sup>120</sup> when applied to international human rights law, several reasons indicate that legitimacy is a valid argument for explaining compliance with international law and human rights law: domestic constituencies might prefer their government to go by the book; or a sense of duty might move authorities to respect human rights in their international interactions.

Goodman and Jinks reshape the discussion in an interesting form. According to these authors, there are three justifications to explain compliance with international law. The first is material inducement, which contains some of both coercion and self-interest model elements. Material inducement “refers to the process whereby target actors are influenced to change their behavior by the imposition of material costs or the conferral of material benefits.”<sup>121</sup> The second is persuasion, which implies compliance because actors have been convinced of the validity of the rule.<sup>122</sup> There is an active process in which “[p]ersuaded actors ‘internalize’ new norms and rules of appropriate behavior and redefine their interests and identities accordingly.”<sup>123</sup> Finally, Goodman and Jinks highlight the role of acculturation, which refers to the process in which the actor incorporates the norm without an active process of internalization. In a way, the acculturated subject need not be convinced about following the rule because he would never imagine not complying with it. Particular importance is given to surrounding compliance with the norm. General compliance makes it more difficult for a player to break the norm and get away with it without consequences.<sup>124</sup>

Again, there is a disconnect between what the human rights movement is expecting from international human rights law and what the latter actually delivers.<sup>125</sup> The weakness of international law when addressing human

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118. *Id.* at 387.

119. *Id.* at 388.

120. Goldsmith and Posner, *supra* note 3.

121. GOODMAN AND JINKS, *supra* note 60, at 22.

122. *Id.*; see also Abbott & Snidal, *supra* note 101, at 141.

123. GOODMAN AND JINKS, *supra* note 60, at 22.

124. *Id.* at 4, 22.

125. KENNEDY, *supra* note 2, at 21–24.

rights contradicts the human rights movement's attempt to legalize rights. Activists want more binding treaties and push states to sign and ratify them. However, states do not seem to take their international human rights commitments seriously—Saudi Arabia signed the Convention on the Elimination of all Forms of Discrimination against Women in 2000, but women still cannot drive there.<sup>126</sup> The current status of international law only provides activists with paint bullets that do not hurt but just stain reputation.

Seeing the bigger picture instead of just focusing on human rights allows the inquirer to understand the human rights dynamics in an unconventional way. It permits a grasp of the tensions that arise in the struggle to protect human rights, summarized in the following paragraphs:

- (i) Human rights defenders work with a rigid concept that gets along well with hierarchical models of relationship, while the world has been transformed into a "liquid" space, in which (a) bargaining is the way in which distributional choices are arranged, and (b) it is difficult to find non-transactionable goods.
- (ii) Human rights are based on a bilateral relationship between states and individuals. It is difficult to get private actors such as multinational corporations into the picture.<sup>127</sup> Human rights vernacular is a value-based language in a world full of native interest-based language speakers.
- (iii) Human rights international adjudication bodies seem to be sitting in the umpire chair from which they can call and sanction wrongdoings, while few actors seem to be paying attention to them.
- (iv) Human rights bodies and activists have no other weaponry to force wrongdoers to comply with international law than naming and shaming them.

While these five points sketch out the context in which the human rights game is played, they also help to figure out the insights behind the crisis of the Inter-American system. In fact, when applying these conclusions to the Inter-American system situation it seems that, in the first place,

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126. See Mohammed Jamjoom, *2 Saudi women detained for driving in ongoing bid to end ban*, CNN (Dec. 3, 2013), <http://www.cnn.com/2013/12/01/world/meast/saudi-arabia-female-drivers-detained/>.

127. There is an indirect control through the mediation of domestic law. But it is the same control that an international human rights body exercises over an individual. See RUGGIE, *JUST BUSINESS*, *supra* note 103; see also, John H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in RADU MARES, *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* (2012) 51-83; David Bilchitz, *A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and Guiding Principles*, in *HUMAN RIGHTS OBLIGATIONS OF BUSINESS* 107 (2013).

the Commission failed to establish a meaningful dialogue with Brazil in the *Belo Monte* case. In addition, a key player like the private contractor of the dam was not even considered. This shows that the Commission significantly narrowed its approach to the problem. In the second place, the U.S. does not care to sign the American Convention because it faces no significant costs in failing to do so. And while the Commission can decide whether the U.S. has fulfilled its obligations under the American Declaration, it has neither enforcing power nor political leverage to make the U.S. to comply with its decisions. Finally, Venezuela did not find any particular benefit in engaging in a system that exercises international supervision of its internal affairs.

In the next section, I will explore a possible solution for these frictions, focusing on the Inter-American Commission of Human Rights. I will suggest that the Commission can improve its efficacy by relying more on its political functions.

### III. POLITICS AND THE INTER-AMERICAN COMMISSION

#### A. *Back to Politics*

As noted in the previous sections, the Inter-American system has been dealing with a crisis, the reasons of which are subtler than what a first glance suggests. In this section, I will focus only on the Commission, applying a different approach—a political approach—to its problems, in an attempt to solve the tensions described above. To do so, I will first detail the history of the Commission, demonstrating that my proposal has already proven its worth. After that, I will draft the possibilities that the political approach opens to the Commission.

#### B. *The Origins of the Commission, its Political Functions, and the Example of Argentina, 1979*

Among interested persons, activists and scholars, there is a widespread sense that the Commission is a quasi-judicial body—or at least that in the past twenty years, the adjudicative function of the Commission has gained importance over its political mandate.<sup>128</sup> This sort of collective con-

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128. See James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 227 (2004) (“[t]he Commission, created in 1959, is a quasi-judicial body that promotes human rights through a series of functions that go well beyond the adjudication of individual cases.”); See also LOUIS HENKIN ET AL., HUMAN RIGHTS 559, 560 (2d ed. 2009) (“[t]he Commission still publishes reports when warranted by serious human rights conditions in an OAS member state. But such reports have become less central to

sciousness about the role of the Commission might be the logical consequence of a human rights movement comprised of lawyers,<sup>129</sup> who think about the system in terms of judges, norms, and binding decisions.<sup>130</sup> This impression is something to bear in mind because, given the scarcity of resources, when the system uses a quasi-judicial approach to solve a conflict, it will possibly be excluding a political response to the problem.

However, it has not always been like this. In its beginnings the Commission was thought of as a sort of study group or advisory organism.<sup>131</sup> As time went by, the Commission gained more political leverage, attributing to itself the power to acknowledge individual complaints,<sup>132</sup> yet without hav-

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the Commission's activities as democracy was restored throughout most of Latin America during the 1980s and 1990s. In their place, the Commission has devoted a greater portion of its resources to the consideration of petitions alleging violations of the American Convention."); Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439, 442 (1991) (before the adoption of the American Convention, "[s]ince financial and human resources were limited, the Commission concentrated all its efforts on the examination of the general situation of human rights in each country. The examination of individual cases clearly took a secondary place. The Commission appeared to process them only because it had a duty to do so and not because of a conviction that its intervention would be helpful. After all, the special procedure for individual cases did not improve the victims' possibilities for redress, and the Commission could attempt to solve the cases through an examination of the general human rights situation in the country. [ . . . ] Apparently, the Commission viewed itself more as an international organ with a highly political task to perform than as a technical body whose main task was to participate in the first phase of a quasi-judicial supervision of the observance of human rights. The Commission's past made it ill-prepared to efficiently utilize the additional powers the Convention subsequently granted it.").

According to Goldman, *supra* note 17, at 880 "decisions finding violations of rights under the American Declaration or the American Convention did not constitute a significant part of the Commission's work until the 1990s." After 1990 and due to the increasing numbers of individual petitions that the Commission started receiving, "the Commission made resolution of cases its top priority during this period".

129. KENNEDY, *supra* note 2, at 27.

130. Cavallaro & Schaffer, *supra* note 129, at 218.

131. Jose Cabranes, one of the earliest commentators on the Commission, wrote in 1968: "The Statute of the Commission adopted in 1960 by the Council of the O.A.S., which defines the Commission's competence, gave little hint of the role which the new body would fashion for itself within the inter-American system, and indicates that some Members of the O.A.S. may have supposed that in voting to create the Commission they had merely voted for the establishment of one more 'study group.'" See Cabranes, *supra* note 29, at 894. Medina, *supra* note 129, at 440, suggests that "[t]he Commission was originally conceived as a study group concerned with abstract investigations in the field of human rights."

132. Cabranes, *supra* note 29, at 894. See also Goldman, *supra* note 17, at 868.

ing authority to issue binding decisions over these cases. The idea behind this was that the Commission would document abuses to exert pressure over violators.<sup>133</sup> The enlargement of the scope of the Commission was subsequently endorsed by OAS members through the American Convention on Human Rights.

There is a key verb in all the legal structure of the Commission—present since its first decade of existence—which is “to promote.”<sup>134</sup> Since the very beginning the Commission has been in charge of promoting human rights in the region.<sup>135</sup> The word “promote” reflects an open mission, not constrained by formal limits. In a way, from the first moment the Commission was able to go beyond its mandate because it was in charge of promoting human rights, and this could well mean to do whatever it takes to improve human rights situations in the region. In such a way, sooner rather than later the Commission expanded its scope of influence, performing functions that can be easily classified as political rather than adjudicative. In addition to its study group purpose it started issuing recommendations to States<sup>136</sup>—individually and generally<sup>137</sup>—and conducting on-site visits.<sup>138</sup>

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133. Medina, *supra* note 129, at 441.

134. FAUNDEZ LEDESMA, *supra* note 18, at 40 (the Commission has always interpreted its competences in a liberal and imaginative manner).

135. Resolution VIII, V Meeting of Consultation of Ministers of Foreign Relations, Santiago, 1959, Official Documents, OAS, Series C.II. 5, 4-6 (1959) (creating the Inter-American Commission on Human Rights, the function of it being the “promotion of human rights”). Certain Attributions of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Advisory Opinion OC-13/93, Inter-Am. Ct. H.R. (ser. A) No 13, ¶ 23 (July 16, 1993):

From the beginning, the provisions of the inter-American system have charged the Commission with the ‘promotion of human rights’ (Resolution VIII, V Meeting of Consultation of Ministers of Foreign Relations, Santiago, 1959, Official Documents, OAS, Series C.II. 5, 4-6) or ‘to promote the observance and protection of human rights’ (Art. 111 of the Charter of the OAS as Amended by the Protocol of Cartagena), as incorporated into Article 41 of the Convention. That is the principal function of the Commission, which defines and regulates all its other functions, in particular those granted it by Article 41, and any interpretation must be limited by those criteria.

136. Cabranes, *supra* note 29, at 894.

137. At its first session in October 1960, members of the Commission put forth two different interpretations of paragraph 9. On the one hand, it was maintained that the correct interpretation is that the Commission is limited to making recommendations to the governments of member states in general and that it may not do so to member states in particular. On the other hand the view was strongly supported that the Commission is empowered to direct its recommendations to one or several states as well as to all of them together, according to whether the violations are of a general or particular nature.

In a time in which democracy was uncommon in Latin America, the Commission played a significant role in protecting rights and helping the region enter a tough transition.<sup>139</sup> Indeed, the political scene during the 60s, 70s, and 80s in Latin America was unstable. Democratic governments alternated with military regimes. Several states adopted repressive policies that led to massive human rights violations.<sup>140</sup> In this situation the Commission gained legitimacy without performing adjudicative functions but through political involvement, which was achieved in different ways.<sup>141</sup>

An interesting example of the Commission's approach to human rights violations is the case of the on-site visit to Argentina in 1979, and its subsequent report.<sup>142</sup> In 1976 Argentina suffered a military coup. The military government committed systematic human rights violations—one of the sad innovations was the practice of disappearances—to suppress leftist guerril-

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The Commission ruled that the provision empowers it to make general recommendations to each individual member state, as well as to all of them.

Durward V. Sandifer, *Human Rights in the Inter-American System*, 11 How. L.J. 508, 517-18 (1965) (citing, Report on the Work Accomplished during its First Session, Oct. 3-28, Inter-Am. Ct. Hum. Rts., OEA/Ser. L/V/II. I, Doc. 32, pp. 9-10 (1960)).

138. FAUNDEZ LEDESMA, *supra* note 19, at 42.

139. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 795 (2006) states:

[E]ven after the entry into force of the American Convention on Human Rights, the Commission's *in loco* investigations occupied much of its time, primarily because in the 1960s, 1970s, and early 1980s many Latin American countries continued to be ruled by authoritarian regimes that engaged in widespread violations of human rights. Most of these states did not, of course, ratify the Convention until the installation of democratic regimes in their countries. The investigations and reports of the Commission provided the only means for pressuring these states to improve their human rights conditions.

140. Henry J. Steiner et al., *International Human Rights in Context: Law, Politics, Morals*, 1021 (3rd ed. 2007).

141. Santiago A. Cantón, *To Strengthen Human Rights, Change the OAS (Not the Commission)*, 20 HUM. RTS. BRIEF 5 (2012-2013). The former executive secretary of the Commission states:

Few would disagree that the work of the IACHR during the 1970s was critical in denouncing the massive human rights violations committed by brutal dictatorships and during the 1980s and 1990s was crucial in supporting the return of democracy. The Commission's work [...] includ[ed] country visits, requests for information, and reports on various human rights situations". I recognize that it is extremely difficult to define the essence of political, but I would say that "everything-else-to-the-adjudicative-function [within the Commission mandate might be classified as political].

142. Report on the Situation of Human Rights in Argentina, *supra* note 3.

las.<sup>143</sup> Finding no protection before domestic judges, many of the persecuted and their families started seeking international protection;<sup>144</sup> before the visit to Argentina, the Inter-American Commission had already opened 1,261 cases—an absolute record based on previous years' numbers—in which individuals cited violations committed by government officials.<sup>145</sup>

Having received so many complaints, the Commission notified the Government that it was preparing a report on the Argentinean situation. The authorities of the regime responded, extending the Commission an invitation to visit the country.<sup>146</sup> The visit was conducted in September 1979, during which the Commissioners interviewed high level officials, political parties members, victims, union and religious leaders. They visited detention centers as well. It is worth noting that the Commission had meetings with almost every relevant political actor of the country.<sup>147</sup> Subsequent to the visit, the Commission issued a report that was widely distributed internationally, and was smuggled inside Argentinean borders.<sup>148</sup> Numerous commentators and historians believe the visit of the Commission and the report were instrumental to the fall of the regime.<sup>149</sup>

Looking at this case, and facing the current crisis, it is possible to say that the Commission's job has never been easy. In fact, it has been sub-

143. Cynthia A. Lynch, *Constitutional Ambiguity and Abuse in Argentina: The Military Reign 1976-1983*, 6 N.Y.L. SCH. J. HUM. RTS. 353, 360-365 (1988-1989).

144. One of the main supporters of the strategy of internationalizing the resistance against the military regime was Emilio Mignone, who suffered the disappearance of one of his daughters. See MARIO DEL CARRIL, *LA VIDA DE EMILIO MIGNONE: JUSTICIA, CATOLICISMO Y DERECHOS HUMANOS* (2011).

145. See Inter-Am. Comm'n H.R., *Strategic Plan 2011-2015*, *supra* note 79, at 44.

146. See Inter-Am. Comm'n H.R. *supra* note 137, ¶ 3.

147. *Id.* at 44-45.

148. David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*, 75 MINN. L. REV. 1023 (1990-1991) (showing the importance of the report: "The Commission's report, widely disseminated outside Argentina, was very influential in focusing world public opinion on the human rights abuses in Argentina. The report thus made it difficult for outsiders to claim ignorance of the Argentine situation. When the Commission released the report, newspapers in Argentina published the conclusions and recommendations together with the government's reply. While the full report was not officially available in Argentina and no press dared to print it, 500 copies were informally distributed and 2,000 photocopies of a clandestine edition were disseminated to newspapers, journalists, judges, bishops, members of human rights organizations, and other individuals.").

149. Goldman, *supra* note 17, at 873, states "the Commission's visit to Argentina in 1979 was its most successful in terms of results." Jorge Taina, *The Legacy and Current Challenges of the Inter-American Commission on Human Rights*, 20 HUM. RTS. BRIEF 43 (2012-2013) (Taina, former executive secretary of the Commission, shares the same opinion).



jected to pressure every step along the way. However, the Commission has managed during its history to increase its own political leverage, achieving impressive results through political actions.<sup>150</sup>

So, a question stands: would the Commission, in the present, benefit from increasing and strengthening its political side?

### C. *Is More Politics the Answer to the Crisis?*

The Inter-American System, and especially the Commission, is facing considerable contestation. A low rate of compliance<sup>151</sup> joins with sentiments of rebellion from some States. In addition to this depressing panorama, there are intrinsic deficiencies of the system, such as financial needs or part-time commissioners. At the same time, the Commission faces other challenges, as described above, that range from a resistance to the human rights idea, to changes in the pattern of governance. When confronting problems, the enumerated adjudication is always seductive, as its outcome is a tangible result. It is quick and dirty: it verifies who is wrong, who is right, and the expectable recomposition. Yet, its drawback is that it usually over-simplifies intricate problems.

I will argue in the following pages that a reinforcement of the political face of the Commission—though it might have neither a likewise tangible outcome nor quick-as-adjudication result—can be beneficial in successfully addressing these complex problems. I recognize that this will mean that the Commission will be considered as a regular player in the global governance scenario instead of as a referee that can only provide vertical judgments. This change will be compensated, however, with the possibility of establishing meaningful horizontal relationships with other players. Still, I will suggest that there are some conundrums the resolution of which will not be easily achieved through adjudication, nor through politics, as they are genetic deficiencies of the system.

#### 1. Making Room for Politics—and Challenge

In an abstract sense, human rights adjudication can be imagined as a simple triangle, in which victims face states at the same level, before an

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150. Other interesting cases are *Dominicana in-loco* visit in 1965 and the *Peru in-loco* visit in 1998. Goldman, *supra* note 17, at 870, 878.

151. According to the 2012 Annual Report, the state of compliance of the Commission's decided and published decisions during the previous eleven years, full compliance has been achieved in only 21.46%; partial compliance in 59.88%; pending compliance reaches as to 19.64%. See Inter-Am. Comm'n H.R., Annual Report, Chapter 3.D, 81 (June 6, 2013).

arbiter situated above both of them imposes a sanction—or absolves—with, usually, no further questions.<sup>152</sup>

This formula is too much of a stretch to hold in the complexity of the problems that the Commission is currently facing. Firstly, its structural design blocks participation of key players such as corporations. Secondly, it incentives conflict instead of consensus. Thirdly, it enlarges the possibility of absolute victories and defeats, fueling conflict because one of the players will get everything while the other will get nothing.

a. *A political approach to Belo Monte: the Plebeian Commission*

Let's use the *Belo Monte* case. Brazil could have reasonably argued that a cost-benefit analysis showed that the displacement of the communities would have implied the provision of energy for several millions of people, plus the creation of a significant amount of jobs, thus saving another several million from poverty. Of course, this had the cost of displacing the communities (assuming that the prior consultation was practiced). If the Commission can only address this wicked problem<sup>153</sup> through an adjudicative procedure—via a precautionary measure with weak basis in the text of the treaty—it will not be able to propose a solution that contemplates the complexities of the case. To add more complexity, under the Commission's current standards, it would be dubious as to whether the State can displace indigenous communities without their consent.<sup>154</sup> In such manner, the win-lose approach to the problem puts the State in a difficult stance because the incentives to generate a crisis are high. Fiercely threatening the Commission would be a plausible way to force it to retreat.

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152. Sonnenberg & Cavallaro, *supra* note 10, at 264, state “[a]ny success by the rights advocates implies a retreat by the forces responsible for rights abuse: thus a classic zero-sum view of the world.”

153. Wicked problems are those social problems that have neither unique nor simple solutions. They are often re-solved because they often re-appear. They have no true or false answer but good or bad approaches. See generally Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL’Y SCI. 155 (1973).

154. Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.?Doc. 56/09, ¶186 (Dec. 30, 2009) (“As with the right to territorial property in general, indigenous and tribal peoples’ right to property over the natural resources may not be legally extinguished or altered by State authorities without the peoples’ full and informed consultation and consent.”).

The flip-side approach to this case would be political. This means that the Commission would try to persuade, not to impose.<sup>155</sup> If it cannot persuade the State, it would try to reach a compromise between the parties. That would involve acknowledging—and making a good faith effort to understand—the reasons of the state, not only of the victims. Moreover, the political approach would require compromises from both sides, not only the State. This might be hard to accept from the victims' perspective. However, the Commission, as a political body, must not betray the larger picture.<sup>156</sup>

This larger picture idea collides with the structural limits of adjudicative procedures, in which only the State and the claiming victims have standing, whereas the rest of the population's interests or the contractor's interests remain unattended. The contractor point of view should not be dismissed. The breach of contract might mean the sacrifice of millions of state dollars. As a side comment, in this matter the personal contact between the Commission and high-level officials of the State would be crucial.<sup>157</sup>

In a way, getting down from the triangle's pinnacle to the plebeian's leveled ground would permit the Commission to engage states in meaningful discussions. The Commission could provide reasons that can be substantially challenged by the States—something that should also lead to improving the Commission's work.<sup>158</sup> The inflexibility of the adversarial system to deal with politically complex cases might well be leading to states leaving the system, as in the case of Venezuela, or States endangering the system's survival, as is happening with Ecuador's move to reform the Inter-American System.

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155. Under the framework devised by GOODMAN AND JINKS, *supra* note 60, at 24, persuasion "requires argument and deliberation in an effort to change the minds of others".

156. It might be argued against that this idea undermines human rights absoluteness. I would respond to that with two things. First of all, there is an inflation of human rights, and it needs to be discussed whether every right proclaimed in treaties, international declarations and so on are human rights—at the risk of losing the strength that the human rights idea poses. Second of all, I would say that property rights are usually replaced by an award, saving the basic core of the right. Moreover, compensation is recognized by the American Convention, art. 21.2.

157. Hearings, within the usual practice before the Commission, do not usually involve high-ranking officials. Goodman and Jinks, in the context of acculturation, suggest that the exercise of good offices by high-level officials such as the European Commissioner for minorities encourages desirable behavior. GOODMAN & JINKS, *supra* note 60, at 126-127.

158. *Id.* at 126-127. They argue that human rights regimes can encourage desirable behavior by "systematically engaging governments in discussion about controversial practices."

b. *A little more conversation*

Hard-adjudication, or its ancestor over-legalization<sup>159</sup> creates an obey-or-leave system in which states might feel ambushed without many incentives to stay in the game, because they do not have enough motivation to argue with the Commission if their reasons will not be listened to.

Controlled rebellion might then be positive for the system, to some extent. Unless the Commission has some sort of divine illumination, following its decisions without challenging them in good faith as if they were binding—when they are not—would be irrational. Thus, if the Commission wants to be taken seriously by a state, it needs to open up a good faith dialogue with them. By implication, the state might decide not to comply with a decision in good faith when it thinks the Commission is wrong—because, yes, the Commission can err. In such a way, the state is obliged to “make every effort to apply with the recommendations of a protection organ such as the Inter-American Commission,”<sup>160</sup> because a recommendation is, in its ordinary meaning, not an order.<sup>161</sup> The solution differs if we talk about a decision of the Inter-American Court. The Court can make mistakes as well, but states that accept its contentious jurisdiction undertake not to challenge and to comply with the decisions in the cases to which they are parties.<sup>162</sup>

c. *Commission: be what you are supposed to be*

According to Goodman and Jinks, an international human rights organization can use numerous and diverse methodologies to promote human rights. Options range from soft to hard, and can include (i) publishing best practices; (ii) monitoring and reporting; (iii) criticizing bad actors; and (iv) issuing binding decisions and material sanctions.<sup>163</sup> The same authors continue in a more practical language:

[I]nternational regimes should carry out a number of activities: allocate available resources to assist states in reporting on their own

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159. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1910 (2002). According to Helfer, “(o)verlegalization can occur where a treaty develops higher levels of obligation, precision, and delegation than existed when a state first ratified the treaty.”

160. *Loayza Tamayo v. Peru*, Judgment, Inter-Am. Ct. H.R., (ser C) No 33, ¶ 80 (Sept. 17, 1997).

161. *Id.* at ¶ 79.

162. See American Convention, *supra* note 4, art. 68(1).

163. GOODMAN & JINKS, *supra* note 60, at 121–122.

human rights practices (e.g., under Article 40 of the International Covenant on Civil and Political Rights), facilitate transnational experts in human rights consultancy (e.g., the technical and advisory services of the Office of the High Commissioner for Human Rights) and create local “receptor sites” for transmitting global norms (e.g., by establishing and strengthening national human rights commissions and ombudsman).<sup>164</sup>

The Commission, due to its open mandate—remember that promote is the key word—is in an outstanding position to do almost all of these activities (it would not be allowed to establish institutions at the domestic levels).

A critic of this position would suggest that it is actually the possibility of issuing binding decisions that characterizes a strong international human rights protection system. However, there are studies that suggest that over-legalization might bring with it counter reactions,<sup>165</sup> while a soft-law approach might have better outcomes “establishing durable norms.”<sup>166</sup> In any case, I would include soft-law within the possibilities of a political approach.

Seen through the governance process, the political power of the Commission might be a powerful tool for advancing human rights in the region: it should not be overlooked that the Commission can accomplish a wide range of actions to achieve human rights protection. Using the model designed by political scientists, Abbott and Snidal, the Commission has the competence to frame issues, set standards, build capacity, and create institutional places for discussing regulatory processes in order to monitor progress.<sup>167</sup> These possibilities not only enlarge the Commission’s impact, but also enable local and international activists to engage in the political process defining the terms of the discussion. Is this enough? I do not want to overstate my argument. Human rights adjudication is certainly needed, and it has been effective. However, the Commission would benefit from enhancing not only its adjudicative function but also its political role. Counterfactual analysis is inherently speculative, but I believe it would not

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164. *Id.* at 129.

165. Helfer, *supra* note 160.

166. GOODMAN & JINKS, *supra* note 60, at 123.

167. These authors describe the regulatory process as comprising five stages: “placing an issue on the regulatory agenda (Agenda-setting); negotiating, drafting, and promulgating regulatory standards (Negotiation); implementing standards within the operations of firms or other targets of regulation (Implementation); monitoring compliance (Monitoring); and promoting compliance and responding to noncompliance (Enforcement)”. Kenneth Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION* 46, 63 (Walter Mattli & Ngaire Woods eds., 2009).

be unreasonable to think that a political approach in the *Belo Monte* case would have had different—and better—results.

## 2. Challenge Permits Engagement, and Engagement Improves States' Political Will as Members of the System

The lack of compliance with international human rights obligations in the Americas might be correlated with state parties' lack of political will to comply with the treaty.<sup>168</sup> In part, the current situation is the result of two related factors: what states say, and what states do. States say they want an independent and strong international human rights system.<sup>169</sup> But they do not make any move in that direction.<sup>170</sup> What is preferable, then: (i) to not sign a treaty; (ii) to sign a treaty but not comply with it without any justification; or (iii) to take seriously the treaty and international commitments that come with it, meaning, for example, that states may reject a Commission decision with proper justification?

I would suggest that, in order to improve the overall effectiveness of the system there is a need to move states from passive signatories (or ratifiers) to active and involved players. States need to challenge the Commission, to improve its reasoning, as a regular behavior of international politics.<sup>171</sup> Engaging regularly with the system implies both winning and losing. The times when states win should create enough incentives for them

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168. Lea Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?*, 9 WASH. U. GLOBAL STUD. L. REV. 639, 688 (2010).

169. Venezuela, for example, in its note to denounce the Commission says that "our country's steadfast resolve to contribute to the construction of our System of Human Rights of the Americas that, in a genuinely independent and impartial manner, will help guarantee human rights in the region." See Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, *supra* note 6, at 12.

170. The budget remains almost equal for the Commission, see Pulido, *supra* note 78. For a similar pattern in the International Covenant on Civil and Political Rights system, see Yuval Shany, *The Effectiveness of the Human Rights Committee and the Treaty Body Reform*, Hebrew University of Jerusalem Research Paper No. 02-13, 14 (2013).

171. I would say that in the case of the European Court of Human Rights, there are occasions in which a State questions a decision issued by the Court, without forcing the system to its limits. See, e.g., *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, 2005-IX Eur. Ct. H.R. 189, 220 (2005); *Greens and M.T. v. United Kingdom*, App. Nos. 60041/08 and 60054/08, 53 Eur. H.R. Rep 21 (2011); *Scoppola v. Italy* (No. 3), App. No. 126/05, Eur. Ct. H.R. 23 (2012).

to not threaten to leave the system when they lose.<sup>172</sup> This approach requires the Commission to allow challenge, to get off the umpire's chair.

### 3. Working for the Long Run

There is an additional benefit of engagement. Engaging entails working with political opponents, not only with governments. Working with opponents gives long-term stability to the system, because it means the system has worked in favor of those who are not in power. When those who were not in power accede to it, they have to pay a high political cost to turn against the Commission, because they have been favored by it.

Argentina's case illustrates this point; the role of the Commission during the military dictatorship might have discouraged Argentina from following Ecuador and Venezuela's path in their straightforward attack on the Inter-American system.<sup>173</sup> In fact, those who were persecuted by military dictators during the 70s, and experienced the benefits of the Commission's influences, acceded later on to the government, but they did not move Argentina to join—at least openly—those attacking the Commission. For them, the contradiction that shooting the IACHR would have meant was a deep obstacle. Of course, there are problems that, at least now, seem impossible to solve. The U.S. absence is a persistent obstacle for the system to develop. However, this is not to be solved by the system, but by time, domestic activism and high international politics.<sup>174</sup>

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172. That would be a plausible consequence of multilateralism as applied to human rights regimes. See Ruggie, *Multilateralism: The Anatomy of an Institution*, *supra* note 13. The idea of multilateralism implies that States think that in the long run this system will benefit them, even though they might not obtain a particular advantage in every single interaction.

173. For some observers, Argentina's position regarding the strengthening process was an enigma. See Katya Salazar, *The Reform Process of the IACHR: Is There a Light at the End of the Tunnel?* DUE PROCESS OF LAW FOUNDATION BLOG, <https://dplf.blog.files.wordpress.com/2013/02/article-on-reform-process-final.pdf>.

174. This situation is hardly ideal for various reasons:

From a human rights standpoint, it creates a disadvantage for the inhabitants of non-ratifying countries by effectively denying them access to the Court in claims against their respective states. From a political standpoint, it also has negative consequences, particularly for non-signers. By remaining outside of the Convention structure the United States and Canada have increasingly found their clout and credibility challenged in the Organization's political bodies when they have pressed various Latin American states to live up to their human rights obligations under the American Convention.

Goldman, *supra* note 17, at 887.

#### 4. A (Sad) Successful Case of the Political Approach: the 43 Mexican Students Killed in Ayotzinapa

The massacre of 43 students in Ayotzinapa, Mexico, is a telling example of how the Commission can use its political attributions to achieve positive outcomes without forcing the limits of the system.

The story of this tragedy starts in September 26, 2014, when around 100 young students from the State of Guerrero took three buses to enter the city of Tixtla, to protest educational reforms. As they were supposedly going to break in to the meeting hosted by the major's wife—who was a politician as well—the major ordered the police to stop them. According to the testimonies, the city police surrounded the buses, detained many of the students, and afterwards, the students were handed to a criminal gang related with drug trafficking. 43 students were seen no more, and government officials have stated that they were probably burned alive.<sup>175</sup>

Due to this event, Mexico entered into a deep political turmoil, with riots and protests occurring all over the country. Beyond the Mexican frontier, artists, human rights activists and religious leaders in every part of the world expressed their sorrow for what had happened.

In the midst of chaos, two Mexican based human rights organizations requested the Inter-American Commission adopt precautionary measures in favor of the students. The Commission quickly adopted the measures, urging Mexico to take the necessary steps to find the students, in order to protect their right to life and physical integrity.<sup>176</sup>

Mexico's attitude towards the Commission did not resemble Venezuela's or Ecuador's in any way. Instead of confrontation, it opened a venue for meaningful dialogue with the Commission, which was a credible actor for the parents of the victims.

In a creative move, the Commission took center stage when it signed a cooperation agreement with Mexico to assist the government in investigating the case. Through this agreement, the Commission committed its aid to solving the case while Mexico accepted this cooperation without considering it an intrusion of its sovereignty.<sup>177</sup>

175. Regarding the facts, see Ayotzinapa: A Timeline of the Mass Disappearance That Has Shaken Mexico Ayotzinapa: A Timeline of the Mass Disappearance That Has Shaken Mexico, VICE (Dec. 9, 2014), <https://news.vice.com/article/ayotzinapa-a-timeline-of-the-mass-disappearance-that-has-shaken-mexico>.

176. Estudiantes de la escuela rural “Raúl Isidro Burgos”, respecto del Estado de México [Students of the Rural School “Raúl Isidro Burgos”, México], Inter-Am. Comm'n H.R., PM 409/14 (2014).

177. The agreement was signed by the State of Mexico, the beneficiaries of the precautionary measures and the IACHR. Acuerdo para la incorporación de asistencia



The agreement established that the Commission would form a group of experts who would have several functions, from elaborating plans to find the missing students, to analyzing the criminal responsibilities of those involved. In addition, the group of experts would advise on the proper international standards for treating the victims.<sup>178</sup>

Although there are no definitive results up to the moments of writing these lines, the agreement is a positive proof of alternative approaches to working out complex human rights cases. By combining the hard judicial method—precautionary measures—with the more soft diplomatic tactic—the cooperation agreement—the Commission emerged as a credible actor for both the state and the victims, forcing Mexico to play the game by the rules without leaving if it does not like the result, and offering the victims a strong incentive to use the Inter-American system as an effective mechanism to address their grievances.

It should be noticed that the language the Commission used focused not on punishing Mexico for its responsibility, but on how to cooperate to solve a structural problem Mexico faced.

Mexico's cooperative attitude also has its rewards. By bringing the Commission to the table as a partner instead of as a referee, it lowered the possibility of being held responsible for not doing enough to find the whereabouts of the victims, or repairing the consequences of these grave violations.

In sum, the political approach offers advantages for every player. Victims have an international protection system that works; states have an ally, a helping hand, not only a sanctioning referee; finally, the Commission puts itself at the center and acquires a leading role that makes it relevant.

#### D. *The Limits of Politics: When Compromise is Not Permissible*

The idea of political compromise has its limits, however. An international organization such as the Commission is constrained not only by its

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técnica internacional desde la perspectiva de los derechos humanos en la investigación de la desaparición forzada de 43 estudiantes de la normal rural Raúl Isidro Burgos de Ayotzinapa, Guerrero, dentro de las medidas cautelares MC/409/14 y en el marco de las facultades de monitoreo que la cidh ejerce sobre la situación de los derechos humanos en la región [Agreement for the incorporation of international technical assistance from a human rights perspective in the investigation of the forced disappearance of the 43 students of the rural normal school Raúl Isidro Burgos of Ayotzinapa, Guerrero, within the precautionary measures MC/409/14 according to the monitoring mandate that IACHR exercises over the situation of human rights in the region], OAS, Nov. 12, 2014.

178. Id.

state parties, but also by its own mandate and by the civil society that operates the system. That is why for the Commission, engagement with states cannot be accomplished at the price of sacrificing its mandate, which is the source of its legitimacy. For instance, in the case of Venezuela—where one of the principle problems was recurrent violations of the right of freedom of expression<sup>179</sup>—the Commission could not have done anything other than stand firmly on the side of free speech, for reasons explained below.

Are there any differences between the Brazilian and the Venezuelan situations? Why is it possible to compromise in the former and not in the latter? I would say that there are three critical distinctions to be made between these two cases. First, there was a strong base in the treaties for the right to freedom of speech (Venezuela), whereas there was not equal basis for the right to prior consent in the *Belo Monte* precautionary measures (although the Commission tried to disguise this right under the cover of the right to life, health and physical integrity). Second, the type of right involved in the *Belo Monte* case was possible to balance with other interests. There might be a compelling interest of the state that outweighs the opposing right.<sup>180</sup> On the contrary, the importance of freedom of speech for the health of a democratic society makes cost-benefit analysis extremely risky—particularly when the government is the actor conducting the cost-benefit analysis.<sup>181</sup> Third, Venezuela's political context was different from Brazil's. Venezuela had been accused of holding unfair elections.<sup>182</sup> The government severely restricted freedom of speech<sup>183</sup> and compromised the judiciary's impartiality,<sup>184</sup> whereas Brazil showed a stronger institutional

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179. American Convention, *supra* note 4, art. 14.

180. Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, *supra* note 155, at ¶¶ 225, 230.

181. The importance of freedom of expression in a democratic society has been long recognized by both the Commission and the Court. *See generally*, Inter-Am. Comm. H.R., *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, OEA/Ser.L/V/II CIDH/RELE/INF. 2/09 (Dec. 30, 2009). It is worth noting, first of all, that prior censorship is forbidden for almost every case according to art. 13 of the American Convention on Human Rights. That shows that, at least, that type of restriction results anti-conventional. Second of all, the case-law of the Inter-American System shows there are some type of speeches that are specially protected—and that means that it would be rare that a state can demonstrate such a compelling interest to outweigh it: (i) political speech and speech involving public interest matters; (ii) speech regarding public officials in the exercise of their duties and candidates for public office; (iii) speech that express essential elements of personal identity or dignity. *See id.* at 11–13.

182. Democracy and Human Rights in Venezuela, *supra* note 52, ¶ 38.

183. *Id.* at ¶347.

184. *Id.* at ¶ 184.

system, with free press, robust civil society and firm political opposition. This is something to take into account: a state's internal politics play a significant role in international human rights law practice, and the Commission should acknowledge this point.<sup>185</sup>

The Commission's withdrawal in Venezuelan cases would have implied a graver long-term loss of legitimacy for the system than the participation of a non-compliant Venezuela<sup>186</sup> (although the latter would have undermined the system as well).<sup>187</sup> In this unsolvable dilemma, the Commission needs to adhere tightly to the strict letter of its sources, in order not to jeopardize its authority.<sup>188</sup>

E. *Why Do Some Measures Generate Compliance, Whereas Other Generate Crisis? A Model to Predict the Effects of the Commission Decisions*

After reviewing the different aspects of the cases that produced the crisis, several questions arise. Why did Venezuela and Ecuador agree to friendly settlements in some cases before the Commission,<sup>189</sup> while threatening the survival of the system with freedom of speech cases? Why did

185. According to Simmons, *supra* note 59, compliance with human rights improves in democracies. This finding suggests that domestic politics need to be considered by international organizations. "The Commission has repeatedly pointed out that representative democracy and its mechanisms are essential for achieving the rule of law and respect for human rights." Inter-Am. Comm'n Hum. Rts., Annual Report 2012, *supra* note 152, at 306.

186. I am not contradicting myself on this. Venezuela could argue with the Commission, but had to comply with the Court.

187. GOODMAN & JINKS, *supra* note 60, at 107.

188. A third possible benefit would be that politics permits differentiation that adjudication does not. Brian Greenhill suggests that states belonging to the same inter-governmental organizations tend to share similar practices. Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT'L STUD. Q. 127 (2010). This finding would suggest that a plausible approach to improve human rights in the long term would be to advance a particular subject against one State—or, better if, engaging the State in the process; later on, the refusing neighbor State would end up following the compliant State. This sort of differentiation—requiring more to one State than to other—is more easily achievable through a political approach rather than an adjudicative approach. Of course, it will hardly get quick results, but it might work well in the long run.

189. Jesús Manuel Naranjo Cárdenas y otros (Jubilados de la Empresa Venezolana de Aviación—Viasa Venezuela) v. Venezuela, Inter-Am. Comm'n H.R., Report No 63/13, Case 12.473, Friendly Settlement (July 16, 2013). Ecuador has also agreed friendly settlements: Karina Montenegro y otras v. Ecuador, Inter-Am. Comm'n H.R., Report No. 61/13, Case 12.631, Friendly Settlement (July 16, 2013).

Brazil menace the Inter-American System and withdraw a candidate for the Inter-American Commission after *Belo Monte*,<sup>190</sup> while it did not defend itself on other cases and even accepted international responsibility?<sup>191</sup> Why did Argentina flirt with Venezuela's position,<sup>192</sup> if it has been a stable supporter of the system during the last 30 years? Why did Chile, on the other hand, amend its Constitution following adjudications from the Inter-American Court of Human Rights?<sup>193</sup>

Answering these questions is anything but simple. There are numerous factors incidental to a plausible answer. In this article, however, I have mentioned five of them: (i) political approaches versus adjudicative approaches; (ii) decisions regarding rights textually contained in the text of the treaty versus decisions regarding rights not literally recognized in the treaty; (iii) procedures with a strong base in the text of the treaty versus procedures—the bases of which are not in the treaty but in a weak norm—such as the rules of procedure; (iv) the internal political situation of a given country; and (v) the alignment between the government's objectives and the Commission's objectives.

Although there might be other variables that could be identified as important to consider, these five elements carry crucial weight when analyzing whether a decision of the Commission will generate compliance or not. In fact, the combination of these four factors provides a model for predicting the consequences of the Commission's decisions.

Although it would require further empirical research, I suspect this model would support the statement that states' relations with the Inter-American system are ambiguous. Governments base their actions on the grounds of international human rights obligations if compliance aligns with their internal agenda. For example, if a government pursues a liberal agenda on prison systems and it encounters internal opposition, it will avoid paying

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190. Victoria Amato, Taking Stock of the Reflection on the Workings of the Inter-American Commission on Human Rights, 16 APORTES DPLF 4 (2012).

191. In the case of Maria Da Penha, regarding gender violence, the State did not defend itself before the Commission. See *Maria da Penha v. Brazil*, Inter-Am. Comm'n H.R., Report No. 54/01, Case 12.051, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000).

192. Salazar, *supra* note 174.

193. *Case of The Last Temptation of Christ*, Judgment of February 5, 2001, Inter-Am Ct. H.R. (Ser. C) No. 73 (2001). In this case, the Inter-American Court ruled that the Chilean constitutional provision that allowed a system of prior censorship for cinematographic spectacles was against the American Convention, art. 13. On August 25, 2001, Chile amended its constitution to eliminate prior censorship, replacing it with a system for rating motion pictures. See Inter-Am. Comm'n H.R., Annual Report of the Social Rapporteur for Freedom of Expression 2001, OEA/Ser.L/V/II.114, doc. 5, ¶ 49, rev. (Apr. 16, 2001).

a political cost for its decisions, arguing that it cannot do so otherwise because it has acquired an international obligation.<sup>194</sup> If, however, international human rights obligations collide with the domestic agenda of a government, the state might reject international duties as foreign impositions. An example of this can be seen in Ecuador's battle against free speech. If corroborated, this model can improve the Inter-American Commission's exercise of its own political equilibrium. Paying attention to these elements would allow the Commission to keep playing its game while bearing in mind that the way in which it addresses a human rights situation might produce different consequences.

This model would permit foreseeing the consequences of the adopted decisions. Subsequently, it would give the Commission a tool to recognize moments, places, and legal instruments for expansion as well as for maintaining the *status quo*. This model would suggest that while general comments might be useful for creative interpretation of the treaty, adjudication under Articles 50 or 51—or precautionary measures—will require a text based approach. It would also permit the Commission to maximize the benefits of a decision. Decisions taken against states with strong democratic systems—that are not likely to create crisis—might afterwards support the Commission in taking decisions against non- or less-democratic States. Also, it would support the Commission in taking the necessary risks to secure the protection of those rights which are the basic pillars of the democratic system: freedom of speech, political rights, and judicial independence. In these cases, the Commission should be more willing to take risks of generating crisis than when protecting other rights.

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194. This, for example, happened in Argentina, when the Congress decided through Law 25.779 to declare absolutely void the Due Obedience Law—*Ley de Obediencia Debida*, Law 23.521, passed on June 9, 1987—through which low rank military officials could not be criminally prosecuted alleging obedience to orders issued by higher rank officials and the Full Stop Law—*Ley de Punto Final*, Law 23.492, passed on Dec. 29, 1986—a statute of limitations for crimes committed during the military regime. When enacting Law 25.779, many congressmen cited the Inter-American Court of Human Rights case law, particularly Barrios Altos Case, Judgment of May 14, 2001, Inter-Am Ct. H.R. (Ser. C) No. 75 (2001). See *Diario de Sesiones de la Cámara de Diputados de la Nación —12 Reunión— 4° Sesión Ordinaria (Especial) - agosto 12 de 2003*). The Argentinean Supreme Court validated this action in the case Simon, also relying in Barrios Altos. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/06/2005, “Simon, Julio Héctor y otros s/Privación ilegítima de la libertad,” Fallos (2005-5-1767) (Arg.).

## CONCLUSION

The history of the Inter-American System shows several triumphs in the cause of human rights, many of which were accomplished through adjudication. This Article acknowledges these victories. However, today the system is struggling to maintain its power and relevance, and fresh thinking is required. I have suggested that while adjudication is an advantageous tool for an international human rights body, in the case of the Commission it ought to be complemented with a reinforcement of its political role. The main threat for the Commission today is descent into irrelevance because of its overreliance on adjudication, which might reduce the Commission into a noisy voice that is heard but not listened to. In a few words, states need to start taking the Commission more seriously.

Three premises support my ideas on how that goal may be achieved. First, I pointed out that the way in which authority and leadership are exercised at the global—and regional—level have significantly changed. Coordination and horizontal relations have gained ground against unilateral choices and hierarchical impositions—that is the process of global governance. Second, I have argued that there are new players in the international system, and it would be wise for the Commission to acknowledge both old and new players' internal rationales. Third, I have described that non-coercive ways of producing compliance with international law are indeed relevant.

Next, I described the history of the Commission, showing that in its origins political functions had a significant weight within its overall responsibilities. Moreover, I have shown that some exceptional successes were accomplished using political approaches rather than adjudication. I then explained how the Commission can enhance the political side of its mandate, as a way to avoid recurring crises, and to improve states political will and trust in the system. Finally, with the elements I laid out throughout the Article, I sketched up a model that could help the Commission foresee the consequences of its decisions.

What I am proposing might not be new, but it has been rather forgotten. The current debate appears to me like a bird that complains because it cannot bark as a dog, while not recognizing that it can fly. It is essential for the Commission to create for itself enough political leverage to back up its decisions and actions. But to move from paper rights to real life rights<sup>195</sup> the Commission will need to go back to politics.

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195. Cavallaro & Schaffer, *supra* note 129, at 274 (stating: “it may be more efficient for the system to recognize the right to medicine or treatment in a particular matter as an element of the right to life or the right to physical integrity than to force the

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system to recognize, through the individual petitions process, economic, social, and cultural rights not deemed ripe for international litigation by states. In short, petitioners should be more interested in advancing guarantees for victims than in advancing rights on paper.”).